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THE INJUSTICE OF CHINESE EXCLUSION.

We have had occasion in the previous issues of this Journal to call attention to the fact that the decisions of the federal courts construing the Chinese Exclusion Acts, were insidiously weaving into the fabric of our laws a thread of gross injustice and indefensible tyranny. It therefore pleases us to learn that the Chinese government, under the advice of the former representative of that government to this country has made representations to our state department that the harshness of our attitude toward Chinese emigrants must be mitigated if we desire the renewal of our treaty with that government.

The unreasonable attitude of our government on this question has often been remarked by men high in authority, among others, by Justice Brewer in the recent case of United States v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. Rep. 621. We have said to China: "We want the trade of your people and an entrance into your country for all our citizens, but in return for these favors we shall insist that you keep strictly on your side of the ocean, unless invited or permitted to come, and for every violation of this latter stipulation, we reserve the right to arrest any Chinaman found within our jurisdiction and place him in confinement pending a decision on the validity of his credentials." The mutuality of agreement in this contract is peculiarly noticeable by its absence, and it should not be an occasion of surprise to our state department that even the Chinese government should have taken notice of the one-sidedness of the bargain we have been in the habit of making with them.

No legislation of our national congress has brought more shame and disgrace upon our country than what is known as the Chinese Exclusion Acts, and even the United States Supreme Court, lenient as they have been toward this legislation, could not stand for certain phases of it. Thus, when that provision of the Geary Act providing for the *imprisonment at hard labor* of a Chinaman whom the commissioner of emigration has decided to be unlawfully in the United States, came before that court, it was held that such provision was an open violation of the constitutional right of trial by jury. The court said: "No limits can be put by the courts upon the power of congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents." One of the most astounding contentions of the government in this case was that a foreigner had no rights under the constitution, and that the federal government could visit upon him with perfect immunity any form of cruelty or oppression. Justice Field rebuked this attitude of the government in the following language: "The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar—in face of the great constitutional amendment which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. Far nobler was the boast of the great French Cardinal who exercised power in the public affairs of France for years; that never in all his time did he deny justice to any one. 'For fifteen years,' such were the words, 'while in these hands dwelt empire, the humblest craftsman, the obscurest vassal, the very leper shrinking from the sun, though loathed by charity, might ask for justice.' It is to be hoped that the poor Chinamen, now before us seeking relief from cruel oppression, will not find their appeal to our republican institutions and laws a vain and idle proceeding."

To cap the climax of our infamous conduct toward a nation which has always favored us with their confidence and good will came the recent

case of United States v. Sing Tuck, 194 U. S. 161, decided April 25, 1904. There a Chinaman claiming citizenship in this country by reason of birth was arrested and deported without trial or judicial hearing of any kind. In 58 Cent. L. J. 481, we commented on this decision as follows: "In an opinion notorious for its puerile argument and vainly concealing an unseemly prejudice against the unfortunate petitioners, whose claim to American citizenship, the opinion relates, 'naturally raises a suspicion of fraud,' Mr. Justice Holmes delivers a staggering blow to the hitherto unquestioned prestige of American citizenship. In no other country in the world, indeed, would those claiming citizenship in such country be stopped on their return to their fatherland and thrown into prison (sometimes called a house of detention) and be denied any appeal to the courts to establish their claim to citizenship."

But we refer to the decision in the case of United States v. Sing Tuck, more especially for the purpose of calling attention to the serious and prophetic words of Justice Brewer: "Even if it should be proved that these petitioners are not citizens of the United States, but simply Chinese laborers seeking entrance into this country, it may not be amiss to note the significance of the act of April 29, 1902, re-enacting and continuing the prior laws respecting the exclusion of the Chinese, 'so far as the same are not inconsistent with treaty obligations,' taken in connection with this provision in article 4 of the treaty with China, proclaimed December 8, 1894, 'that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens.' I am not astonished at the report current in the papers that China has declined to continue this treaty for another term of ten years. Finally, let me say that the time has been when many young men from China came to our educational institutions to pursue their studies, when her commerce sought our shores, and her people came to build our railroads, and when China looked upon this country as her best friend. If all this be reversed and the most populous nation on earth becomes the great antagonist of this republic, the careful student of history will recall the words of Scripture, 'they have sown the wind, and they shall reap the whirlwind,' and for cause of such antagonism need look no further than the treatment accorded during the last twenty years by this country to the people of that nation."

NOTES OF IMPORTANT DECISIONS.

ARREST—WHAT CONSTITUTES THE OFFENSE OF RESCUE.—In the recent case of Adams v. State, 48 S. E. Rep. 910, the rule was laid down that a man cannot be punished for rescuing a prisoner from the hands of an officer unless the prisoner is lawfully under arrest. In this particular case, the officer making the arrest, did so after a warrant had been issued, but failed to take a copy of the same with him in making the arrest. After he was in the hands of the officer he was rescued by a compatriot and escaped. The latter was indicted for rescuing a prisoner from the hands of an officer. In holding that the facts proven did not constitute the offense of rescue, the Supreme Court of Georgia says:

"It is apparent from the language of the Penal Code of 1895, § 309, that a rescue is not made penal except where the person rescued is in legal custody. If the detention is illegal, or unauthorized by law, then the law does not protect it by making it a crime to liberate the person in custody. This rule seems to prevail generally. See People v. Ah Teung (Cal.), 28 Pac. Rep. 577, 15 L. R.A. 190, and cit. Nor does it matter whether the person arrested has made resistance or has submitted passively to the unlawful arrest. The rescue is not punishable unless the custody is lawful, and the submission of the prisoner does not legalize the arrest or bring the unlawful detention within the protection of the law. State v. Rollins, 113 N. Car. 722 (8), 18 S. E. Rep. 394. See, also, State v. Beebe, 13 Kan. 589, 19 Am. Rep. 93. We come, then, to the question whether in the present case Shaw was legally in custody by virtue of a lawful arrest at the time he was liberated by Adams. Shaw was not charged with a felony, but with a misdemeanor. The offense had not been committed in the presence of the arresting officer. Shaw was not endeavoring to escape, and a warrant had actually been issued for his arrest. Under these circumstances the officer had no authority whatever to arrest Shaw, except under the warrant. Pen. Code 1895, § 896. The officer was not bound to show his warrant before making the arrest, but unless he, or another in the neighborhood, with whom he was acting in concert, had been in possession of the warrant, and in a position to show it upon demand, the arrest was not lawful. The officer did not have the warrant with him, but had it at his home. Just how far

from the scene of the arrest his home was situated does not clearly appear, though it seems to have been some distance. At any rate, we think that the officer was not in such possession of the warrant as to derive from it any authority to make the arrest. Nor was the warrant in the possession of another with whom this officer was acting in concert. See Robinson v. State, 93 Ga. 77, 18 S. E. Rep. 1018, 44 Am. St. Rep. 127. In Gallard v. Laxton, 2 B. & S. 363, 9 Cox, C. C. 127, it was held that in a case in which a lawful arrest could not be made except under a warrant the arresting officers were bound to have the warrant ready to be produced if required; that an arrest in such case by police officers who did not have the warrant in their possession at the time was illegal, although the warrant had previously been in the possession of one of them, and was at the station house at the time of the arrest, and although no demand was made upon the officers for the production of the warrant; and that, as the arrest was illegal, persons who took the prisoner from the officers could not properly be convicted of rescue. In Codd v. Cable, 1 Ex. Div. 352, it was held that one against whom a warrant had issued, charging a misdemeanor, could not be lawfully arrested under such warrant by an officer who did not have the warrant in his possession at the time. Mellor, J., said: 'Whenever a warrant has been issued to arrest a person charged with an offense in respect of which he cannot be apprehended without a warrant, the police officer must have the warrant in his possession at the time when he executes it. If he has not, the arrest will be illegal.' See, also, Reg. v. Chapman, 12 Cox, C. C. 4; Hale v. Roche, 8 T. R. 187. Upon principle and authority, we think the arrest and detention of Shaw must be held to have been unlawful. This being true, Adams cannot be lawfully punished for having liberated Shaw from such detention."

THE RULE OF COMPARATIVE INJURY IN THE LAW OF INJUNCTION.

Injunction being an equitable remedy, the granting or withholding of which is founded upon the principles of that great branch of our jurisprudence, it is only natural that courts of equity should have evolved and established the rule suggested by the subject of this paper. If an application for an injunction is an appeal to the "conscience of the chancellor," a commonplace of the profession, it is reasonable to suppose that the chancellor would consider the balance of conveniences, and ordinarily incline to refuse the relief sought, if to grant it would inflict greater injury upon the respondent than the petitioner would sustain by its being refused. Hence the rule, more frequently hinted at, or applied by inference, than boldly and unequivocally announced as a controlling principle in the disposition of a suit, that ordinarily an injunction will be refused where to grant it will do greater harm to the one against whom it is directed than the other will sustain because of its being denied.

It shall be the purpose of this discussion to ascertain whether the rule referred to is really of controlling force in the law, and to consider its application to the various situations in which it has been invoked by counsel and applied or discussed by the courts.

On Preliminary Hearing.—The rule of comparative injury has become one of peculiar application on the preliminary hearing, because of the delicate nature of the remedy at that state of the progress of the case.[1] It is not true, however, that this is the limit of the operation of the rule, as will be observed from applications thereof hereinafter noticed. Though it is doubtless true that the rule will be more readily applied on the preliminary hearing than on the trial of the case on its merits.[2]

Nature of Defendant's Wrong.—The nature of the wrong of the defendant, or rather the intention with which the wrong, the continuance of which is sought to be enjoined, is done, may be of controlling force in the application of the rule of the text. Thus, where the defendant's act is wanton or malicious, no matter how relatively great the defendant's injury by the granting of the petition may be, the plaintiff will not, for that reason, be denied the relief sought.[3]

As Between Petitioner and Public.—Within certain constitutional limitations the interests of individuals must succumb to the higher interests of the public. So, where, upon an application for an injunction, it appears that to grant the relief prayed for, the interests of the public would be injuriously affected, or the convenience of the public interfered with, the court, notwithstanding the fact that ordi-

[1] Barnard v. Gibson, 7 How. (U. S.) 650; Ryan v. Williams, 100 Fed. Rep. 172; Scanlan v. Howe, 24 N. J. Eq. 277; Cobb v. Massachusetts Chemical Co., 179 Mass. 423, 60 N. E. Rep. 790.

[2] Ryan v. Williams, 100 Fed. Rep. 172.

[3] Ryan v. Williams, 100 Fed. Rep. 172; Jones v. Mayor, etc., City of Newark, 11 N. J. Eq. 452.

narily, or as between private parties, the petitioner would be entitled to the relief sought, will refuse it.[4] The case of Herr v. Central Kentucky Lunatic Asylum[5] may be referred to as a case of this character. The petitioner there was the owner of a tract of land bordering upon a stream across which one of the charitable institutions of the state had, without objection from the petitioner and at great expense, erected dams above such land The petitioner at the time such dams were built knew that the institution had for many years maintained a sewer through which it emptied its refuse into the stream at a point between the dams and the plaintiff's land. It was sought by injunction to compel the defendant asylum to tear out its dams and sewer, alleging that the stream was polluted thereby and rendered unfit for use. The court of appeals affirmed the action of the court below, refusing the injunction, upon the ground, principally, of the laches of the plaintiff, but significantly observed that "an injunction ought not to be granted where the benefit secured by it to the party applying therefor is comparatively small, while it will operate oppressively and to the great annoyance and injury of the other party and to the public, unless," observing the limitations of the rule already referred to, "the wrong complained of was so wanton and unprovoked as properly to deprive the wrongdoer of all consideration for its injurious consequence."

In the case of Fisk v. City of Hartford,[6] the plaintiff sought to restrain the city from diverting the waters of a river, and its tributaries, upon which they maintained mills at points within the limits of said city, where they were the owners of exclusive water privileges, until the damages accruing to them for such diversion had been ascertained. Here, too, the court held that the plaintiffs by their laches had disentitled themselves to the specific relief prayed for, though ordinarily otherwise an injunction would be granted them, yet the court, without elaboration, noticed that the granting of the relief prayed for involved the cutting off of the city's entire water supply, and would, or might, result in great harm to the city by destroying its fire protection, and exposm ot danger from fire and disease, and otherwise causing great public inconvenience and suffering. And in one case at least, involving municipal water supply, it has been held that where great public interests are opposed to minor private interests, notwithstanding the reprehensible conduct of the public's agents, the individual must submit to the minor infringment of his rights and be denied injunctive relief, in deference to the rights of the public.[7] The question squarely arose in this connection, and was unequivocally applied by the New Jersey court in the case of Jones v. Mayor, etc., of the City of Newark.[8] The opinion in this case is sufficiently instructive to warrant its being set out at some length. The complaint was for an injunction by certain property owners to restrain the collection by the city of certain assessments for benefits sustained by the construction of a sewer in said city. The petitioners were a few only of about 500 persons whose lots or lands were assessed for the construction of

[4] See Cameron Furnace Co. v. Pennsylvania Canal Co., 2 Pears. (Pa.) 208; Boston Rolling Mills v. Cambridge, 117 Mass. 396; Stein v. Brenville Water Supply Co., 32 Fed. Rep. 876, and cases cited *infra*.

[5] (Ky. 1901), 61 S. W. Rep. 283, 22 Ky. Law Rep. 1722, 41 Cent. L. J. 37.

[6] 70 Conn. 720, 40 Atl. Rep. 906, 45 Cent. L. J. 291.

[7] McCullough v. City of Denver, 39 Fed. Rep. 307. The plaintiff brought suit for injunction to restrain the city from building a ditch or flume over a tract of vacant land, which plaintiff was platting. On a Sunday the city authorities clandestinely entered the plaintiff's premises with a large force of men and without giving notice to the plaintiff, and without the payment of any compensation for the land taken or the damage sustained, made an underground flume along the north side of the tract. The purpose of the flume was to convey water to other parts of the town where it was greatly needed. The court, in refusing the injunction, said: "It is a matter of profound regret that the city authorities should feel at liberty to go about a work of this kind with force and arms, and on the Sabbath day. A municipal government, charged with the duty of maintaining law and order and rights of property within the corporate limits, should not be endowed with or entertain the predatory instincts and lawless habits of private corporations. In this instance the conduct of the city government seems to have been according to the practice of a railroad corporation stealing a right of way. Such indecent and illegal proceedings cannot be justified in any case, and there is no shadow of excuse for such conduct in this instance. The extraordinary conduct of the city authorities will not, however, give authority to the court to interpose by injunction. The damage to complainant's land on account of the flume will be trifling, and the water is needed for public use. Under such circumstances the court will decline to act, and leave complainant to his action at law for any damages he may be entitled to."

[8] 11 N. J. Eq. 452.

the sewer. The chancellor refused to grant the injunction prayed for, saying: "I cannot grant the injunction unless I declare all the proceedings in relation to the second assessment illegal and void. The consequences of such an announcement by this court would be most injurious to the rights of the defendants, while it would be of substantial benefit to no one. It appears, by a schedule annexed to the bill of complaint, that there are upwards of five hundred individuals who are in default in not paying the assessments made upon their property, to defray the expenses of constructing the sewer in question, and whose property, as well as that of these complainants, is advertised for sale, in consequence of such default. The fact plainly shows the very great mischief and embarrassment that would flow from the granting of this injunction. The magnitude of the injury to the city of Newark that would directly follow, bears no proportion to any benefit that would be conferred upon the complainants or any injury averted as to their rights by granting them the remedy they solicit. I think the court may judiciously lay down the rule that an injunction ought not to issue where the benefit secured by it to one party is but of little importance, while it will operate oppressively and to the great annoyance and injury of the other party, unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrongdoer of the benefit of any consideration as to its injurious consequences."

As Against Quasi Public Companies.—The same rule applies with equal force where the rights of a defendant engaged in a public enterprise are concerned. There are a number of cases on this phase of the subject, among which may be noticed that of Society for Establishing Useful Manufactures v. Taylor.[9] There the defendant was a company incorporated with the right to take water from a river for the purpose of furnishing power for manufacturing purposes. Upon doing an act in violation of an agreement with the plaintiffs, the defendant was enjoined below, but on appeal the judgment was reversed, the court remarking that the appellant company, being incorporated to supply a water power to the community for manufacturing purposes, was possessed of a *quasi*-public character; that it to some extent became a trustee of the power for great public purposes and that on this account a court of equity should not enforce by injunction a contract entered into by it which would prevent it from furnishing water with regularity to a large number of its lessees. It was observed by the court that the case was governed by the rule that, "where public interests, or the rights of large classes are involved, an injunction will not be granted, except upon hearing and notice, and then only when it appears clear, upon bill and answer, that the injunction will not prejudice some public or *quasi*-public interest."

The rule has been successfully invoked in other cases involving so important a matter as the water supply of a community, which are referred to in the note.[10] The most extensive class of cases embraces those affecting *quasi*-public corporations, or companies invested with the power of eminent domain, as railways. Thus, the comparative injuries of the parties, and consequently the inconvenience to the public, will be considered in determining the right of an abutting property owner to an injunction restraining a railway company from laying its tracks in a highway beyond the *medium filum via*.[11] And the general rule obtains, that where a railroad company has irregularly taken possession of lands, but with capacity under the law to acquire title, and constructs its track thereupon and uses the same for the operation of its trains, where the advantage to the plaintiff would be small, and the injury to the railway, and the inconvenience to the public incalculably great, an injunction will not issue to stop the running of the trains until the plaintiff may be compensated, or to compel the removing of the tracks.[12] It has been intimated, however, that where other reasonable methods of procuring compensation have failed, a plaintiff whose lands have been wrongfully taken by a railway company

[9] 12 N. J. Eq. 498.

[10] Cameron Furnace Co. v. Pennsylvania Canal Co., 2 Pears. (Pa.) 208; Wintermute v. Tacoma, etc., Co., 3 Wash. 727, 29 Pac. Rep. 444.

[11] Morris & Essex Railroad Co. v. Prudden, 20 N. J. Eq. 530.

[12] Erie Railway Co. v. The Delaware, etc., R. Co., 21 N. J. Eq. 283; Whittlesey v. The Hartford, etc., R. Co., 23 Conn. 421; Hentz v. Long Island R. Co., 13

should be awarded injunctive relief.[13] Or where the relative rights of the parties are not alone sufficiently disproportionate to justify the court's refusing a plaintiff injunctive relief, the added circumstance of plaintiff's laches may combine to disentitle the plaintiff to the relief sought.[14]

The New Jersey court, in the case of Torrey v. The Camden and Atlantic R. Co.,[15] refused an injunction to the builders of a branch railroad to restrain the company for whom it was built from using it until it should be paid for according to contract, on the ground that no advantage would thereby result to the plaintiff, while great injury to the defendant, and serious detriment to the public, would result from the granting of the injunction, even where, as it seemed, the defendants had possessed themselves of the road without the payment of any part of the consideration agreed to be paid therefor.

As Between Private Parties.—The rule applies, almost equally, as between merely private parties, with the difference probably, that where the interests of very many of the public would be hazarded materially, the court may refuse to grant an injunction where one might be granted if only an individual were defendant; that is, the extent of the defending interests, compared with the insignificance of the complaining interests, may in itself be a ground for the application of the rule under discussion. The most numerous class of cases grows out of controversies affecting the construction of buildings or the changing of the character of real estate. Where a defendant has appropriated and changed the character of a plaintiff's land, while ordinarily prescriptive rights will not be allowed to be acquired, as to defendants not invested with the power of eminent domain, the continued occupation under such wrongful appropriation being subject to injunction, still, if it appear that the value of the land, the character of which is changed, is small, that its value to the plaintiff when restored would be slight, and that to compel the defendant to restore it to its former condition would involve a cost wholly disproportionate to the value of the land involved, a mandatory injunction for restoration will be denied.[16]

In a recent case of a very novel character, however, the court did refuse to grant an injunction to restrain the defendant from destroying, for his own benefit, the common property of the parties, relegating the plaintiff to his action for damages, because of the comparative injuries that would have flown from the granting or refusing of the injunction prayed for. The case referred to is that of Robinson v. Clapp.[17] Briefly stated, the facts were that the parties were the several owners of adjoining lots, upon the line between which stood a tree in about equal proportions upon the lots. The defendant desired to build a house upon his lot coming up to the property line between the parties, to do which he threatened to cut down, or to cut away one-half of the tree. To prevent this would have resulted in great damage to the defendant, while the plaintiff's property would even have been benefitted by the removal of the tree, or at most his pecuniary damage would have been comparatively slight. Upon such facts the court held that the injunction would not lie to restrain the cutting away of the tree. The same conclusion has been arrived at by the Michigan court, concerning common property, in an action to enjoin the defendant, a reversioner of one-half of a building, in which the plaintiff had a life interest, from removing a stairway between such half and the other half, of which the defendant was the owner of the present estate in fee.[18] So, also, it has been held that where a landlord is about to improve his building, he will not be restrained at the suit of the tenant from erecting a bridge or scaffolding around and outside of the building intended to be improved, as required by

Barb. (N. Y. Sup. Ct.) 646; Skranika v. Oertel, 14 Mo. App. 474; Highland Ave., etc., R. Co. v. Birmingham Union Railway Co., 93 Ala. 505; Schumier v. St. Paul, etc., R. Co., 8 Minn. 113; Garnett v. Jacksonville, etc., R. Co., 23 W. Va. 406.

[13] Hentz v. Long Island R. Co., 13 Barb. (N. Y. Sup. Ct.) 646.

[14] Pettibone v. Milwaukee, etc., R. Co., 14 Wis. 479.

[15] 18 N. J. Eq. 293.

[16] In Cobb v. Massachusetts Chemical Co., 179 Mass. 423, 60 N. E. Rep. 790, the rule was applied to an action against the owner of a mill race, who had wrongfully appropriated and used a strip of adjoining land for the widening of the channel of the race.

[17] 67 Conn. 538, 35 Atl. Rep. 504, 65 Conn. 365, 32 Atl. Rep. 939.

[18] Scott v. Palms, 48 Mich. 505, 12 N. W. Rep. 677.

a valid ordinance of the city wherein such property is situate, notwithstanding the structure would greatly interfere with the tenant's easement of light and air, and his access to the building, where so to restrain the defendant would work a far greater hardship to him than would be imposed upon the plaintiff by refusing to grant the prayer of his petition.[19]

In the course of his opinion in the case last cited, Blanchard, J., said: "It is not claimed by plaintiff that the wooden bridge is more cumbersome than the exigencies of the case or the requirements of the law demand, nor that the plaintiff's rights as tenant are being impaired to any greater extent than is absolutely necessary. A continuance of the injunction, under the circumstances of this case, would seem to me to work a greater hardship to defendant than the vacation of it would to plaintiff. In such a case, under the authorities, the injunction should not be continued. It would be establishing a dangerous precedent," continued the court, "to grant an injunction in every case where, as here, the possible rights and privileges of a tenant are temporarily, but not unnecessarily, interfered with by proposed alterations, and improvements to the landlord's building, even though the tenant may suffer some damage thereby. To hold otherwise," the court concluded, "would seriously affect future building operations, and timely and necessary improvements of the buildings." The reasoning of the court seems hardly satisfactory, and it is doubtful whether this decision is sound. The dissenting opinion of Van Brunt, P. J., in this case, is a strong argument against the opinion of the majority, and is set out at some length in the note below.[20]

In the case of Backes v. Curren,[21] the court again refused to grant an injunction to a lessee restraining the lessor from erecting a building contrary to the specifications agreed upon, upon the ground, among others, that too great harm would thereby result to the defendant.[22]

[19] Gerken v. Hall, 35 Misc. Rep. 225, 71 N. Y. Supp. 753, 65 App. Div. 16, 72 N. Y. Supp. 1104.

[20] Van Brunt, P. J., in a dissenting opinion, delivered himself as follows (65 App. Div. 16, 72 N. Y. Supp. 1104): "I dissent from the conclusion arrived at by the majority of the court, affirming the order in this case upon the opinion of the court below. If the rule adopted in this case is to prevail, tenants have no protection whatever against aggressions of their landlords, when such landlords have the ability to respond to any judgment which may be recovered in an action at law. This is the first time in the history of jurisprudence in this state, so far as I have been able to learn, that a covenant for quiet enjoyment has been deliberately violated by a landlord and no protection has been afforded to the tenant, except his right to bring an action for damages. Cases are cited where the courts have remitted a landlord to his action for damages where he has sought to enforce a restrictive covenant against the use of the premises, but none can be found where the landlord has threatened to and is, deliberately violating his covenant of quiet enjoyment of the premises leased, and the tenant has not been afforded any protection. It is said that the maintenance of an injunction under the circumstances disclosed in this case, would seem to work a greater hardship to the landlord than a vacation of it would to the tenant. In other words, notwithstanding that the landlord deliberately violates his covenant of quiet enjoyment, because by such violation he may gain greater advantages than the damage he does to his tenant, therefore the tenant is not to be protected. It seems to me that this is a dangerous doctrine. It is urged that the landlord notified the tenant that he was going to make certain improvements. This, however, the tenant denies. But, if he did, and he then went on and covenanted that the tenant should enjoy the premises for the term leased, which is to prevail, his notice, or his covenant? It is said in the opinion of the court below: 'It would be establishing a dangerous precedent to grant an injunction in every case where, as here, the possible rights and privileges of a tenant are temporarily but not unnecessarily, interfered with by proposed alterations and improvements to the landlord's building, even though the tenant may suffer some damage thereby.' Why, then, did the landlord make the lease? To what extent is he to be allowed to interfere and violate his covenant? Who is to judge? What security has the tenant? How is the tenant to give proof in a court of law as to how many people have been deterred from entering his establishment by reason of this serious disturbance of the facilities of ingress and egress on and from the premises leased? The landlord has a big building which he desires to improve. The tenant has but a small portion of that building. The landlord's interests are great and the tenant's small; but the small interest of the tenant is entitled to the same protection of the law as the large interest of the landlord. His own lamb may be of vastly more importance to the tenant than the numerous flocks of the landlord to him. The order should be reversed."

[21] 36 Misc. Rep. 492, 73 N. Y. Supp. 937. This cas was reversed as reported in 69 App. Div. 188, 74 N. Y. Supp. 723, and subsequently, it seems, the appellate division denied the motion for an injunction, as appears from the memorandum decision, in 75 N. Y. Supp. 1121.

[22] In the opinion as it appears in 36 Misc. Rep. 492, 73 N. Y. Supp. 937, Clarke, J., says: "His contract is for the future letting at a certain rent of a specified store. I see no more difficulty in establishing his damages for a breach than in any other case of an executory contract. And finally, it seems to me, upon these papers that the damages to these defendants which would flow from the injunction if granted

In the case of Broskey v. Cumberland Realty Company,[23] the court repudiates the doctrine that where the defendant is merely a private individual, seeking to accomplish its own private ends, in violation of a plaintiff's unequivocal rights, injunction will not lie because of the comparatively great inconvenience or damage thereby to the defendant. The Realty Company in this case had become the owner of an apartment house, with full knowledge of the fact that the plaintiff was the tenant of two rooms in said building, and that his term would not expire for five months. The lease to the plaintiff from the defendant's grantor provided that during his term the plaintiff shouldhave the use of the elevator service, and various other privileges, but before the expiration of his term the defendant began to tear away and remove the building, to deny him the right of unobstructed ingress and egress, and otherwise to oust the tenant, with a view to erect a structure to cost $2,000,000. Upon an application for an injunction to restrain the defendant from committing the acts mentioned, it was argued that the plaintiff's rights under his lease of the two rooms in the old building were so nearly insignificant when compared with the magnitude of the defendant's enterprise, and with the loss it would sustain by the granting of the injunction restraining it from the prosecution of its enterprise, but the court denied the correctness of the defendant's position, and held that injunction would lie to prevent the defendant's interfering with the plaintiff's enjoyment of the remainder of his term. In thus disposing of the case Freedman, J., said:

"Under the facts and circumstances as disclosed by the affidavit submitted on this motion, I am not prepared to admit that the damages that might be sustained by the plaintiff, should the methods taken by the defendant to evict him be successful, as they would be if continued, could be proven or recovered in a common law action. Neither am I willing to subscribe to such methods or the practice sought to be established by the conduct of the defendant herein. I much prefer the doctrine enunciated by Mr. Justice Beekman in the case (not reported) of Boitel v. Morton, where he, under a somewhat similar state of facts, says 'that the latter (the defendant) is clearly within his right, both legal and equitable, ininsisting upon restraining his tenancy during the continuance of his term, notwithstanding the exigencies which apparently make it so important to the defendant to obtain possession of the premises. To assume any other position in a case of this kind would be to subject every lessee to the will of an old or new owner, who might desire, during the continuance of his lease, to destroy the leased building for the purpose of erecting a new one.' "

The same conclusion was arrived at in the case of Lynch v. Union Institution for Savings[24] where the owner of the fee threatened to evict a sublessee under a lease assented to

would be so much greater than those alleged to plaintiff that the doctrine that 'the court should not grant an injunction where it would work a greater wrong than it is intended to remedy' obtains."

[23] 35 Misc. Rep. 50, 70 N. Y. Supp. 1125.

[24] 158 Mass. 394, 33 N. E. Rep. 603. In this case, Holmes, J., speaking for the court, said: "The only question intended to be presented by the report is whether the injunction should be denied, and the plaintiff confined to recovering his damages on the ground that the injury of the injunction to the owner would be incommensurate with the benefit to the plaintiff. The result of denying the injunction is 'to allow the wrongdoer to compel innocent persons to sell their right at a valuation.' Tucker v. Howard, 128 Mass. 361, 363. The decision in Brande v. Grace, 154 Mass. 210, 31 N. E. Rep. 633, is not an authority for that. There the defendant built a structure on its own land after a decision by the superior court that it had a right to do so. When the plaintiff's lease had but eight months more to run, the court decided that the structure was unauthorized because it interfered with an implication in the lease that the rooms should continue to open on Tremont street; but an injunction was refused in view of the early termination of the lease. In the present case the plaintiff's lease has a year and nine months to run. The defendant is not interfering with a doubtful easement under a mistaken view of its rights. Now, at all events, if not from the beginning, it simply is dispossessing, or trying to dispossess, a man of his land, by willful wrong; and its argument that it should not be restrained in proceeding must be that it can make more money out of the plaintiff's property than the plaintiff can, if it is allowed to take it. See Goodson v. Richardson, L. R. 9 Ch. App. 221, 224. If we are to infer, although it does not appear with definiteness, that the defendant has been at some expense already on the plaintiff's premises, we see no reason to doubt that it has acted with knowledge of the plaintiff's rights. What it has done outside of the plaintiff's premises, and not interfering with him, is no concern of his. The defendant's outlay does not better its case on the question of a prohibitory injunction, and we can see no reason why it should not be required to restore the premises to their original condition. See Tucker v. Howard 128 Mass. 361."

by the defendant's predecessor in title, three years of whose term were unexpired at the bringing of the suit, and almost two years at the time of the supreme court's decision. Here the court went so far as to enjoin restoration, notwithstanding the cost to the defendant of complying with the order.

In the case of Brande v. Grace,[25] however, the same court, upon a somewhat similar state of facts, refused an injunction to the tenants. The plaintiffs were tenants of one Grace, of certain rooms. The defendants were sublessees of said Grace, and as such proceeded to alter the building, in which the plaintiffs' rooms were located, by taking down the original front wall thereof and erecting in its place a new front wall to the entire height of the building, so as to enclose the rooms occupied by the plaintiffs, and to interpose another room between them and the street. At the beginning of the work plaintiffs filed a bill for an injunction, which the court below refused. The defendants thereupon proceeded to complete the new front wall and otherwise to impair and violate the plaintiffs' rights under their lease. At the time of the court's decision the wall had been completed and but eight months of the plaintiffs' term remained. It was held that to grant the injunction to compel the defendants to tear away their wall would cause an unnecessary destruction of property, while doing the plaintiffs but little good, and that they should, therefore, be remanded to their remedy of damages. In the Lynch case[26] the court distinguished this case upon the ground that the structure here was erected and completed after the court below had adjudged that the defendants were legally authorized to build it, and upon the further ground that the plaintiffs' lease here had but a short time to run.

Upon the other hand it has been held that where a tenant has made alterations in the leased premises that are of but little, if any, damage thereto, the landlord may not have an injunction commanding the restoration of the premises, where this would be disproportionately expensive to the defendant.[27]

So, the owner of a lot may, as of strict, technical right, be entitled to have removed obstructions in a street interfering with the free access to his property, yet where to compel their removal would be of no real benefit to the plaintiff, while great damage would thereby result to the defendant, the plaintiff's remedy will be restricted to an action at law for the damages sustained.[28] But in another case the Alabama court has granted an injunction to restrain a lot owner from erecting pillars of a building so as to encroach on the street, where the benefit to the plaintiff was substantial, notwithstanding the damage to the defendant by the granting of the injunction was considerable.[29]

The cases cited and set out in the text, are illustrative of the decisions upon this question, and of the trend of the courts. Others announcing or bearing upon the rule, are set out in the note following and may be consulted to advantage.[30]

In conclusion, the following propositions may be said to be deducible from the decided cases upon this subject: First, that where

[25] 154 Mass. 210, 31 N. E. Rep. 633.

[26] See *supra*, note 24.

[27] Thorn v. Owen, 3 Duer (N. Y. Supr. Ct.), 15.

[28] Chapin v. Brown, 15 R. I. 579. See, also, Seeger v. Mueller, 28 Ill. App. 28.

[29] First National Bank v. Tyson, 133 Ala. 459, 32 So. Rep. 144.

[30] In the case of Hawley v. Beardsley, 47 Conn. 571, the court refused to grant an injunction restraining the defendants, who were adjoining owners to plaintiffs, from making a certain fill against the piles of the plaintiffs. The sole injury that would have accrued to the plaintiffs consisted in the pressure against and the probable displacement of the piles, the damage resulting from which would not have exceeded $300, which the defendants were amply able to pay. To have refused the injunction would have worked great and irreparable damage to the defendants. In fact the damage to the plaintiffs by the threatened act of the defendants was comparatively inconsequential, and could have been averted by a comparatively small outlay. For these reasons injunctive relief was denied. In Richard's Appeal, 57 Pa. 105, the petitioner was the owner of residence property and a factory for the manufacture of certain cloth, which were situate near the mill of the defendants, at which, in the manufacture of steel and iron, large quantities of bituminous coal were used, thereby injuring the petitioner's business as a manufacturer of cloth, and also interfering with the comfort of his residence. Because of the comparative value of the interests involved and of the damages that would have resulted to the respective parties by the granting or refusing of an injunction, injunctive relief was denied. Gallatin v. Oriental Bank, 16 How. Prac. (N. Y.) 253, was an action in which plaintiff, the owner of a claim of $3,400.00 sought to tie up property in the hands of the defendant to the extent of $30,000.00 held by the defendant bank as security. The injunction was denied, the writer of the opinion saying that "such an injunction appears to me would create a greater wrong than it is intended to remedy." In Swift v

the plaintiff's rights are substantial, the balance of conveniences of the parties will be entitled to small consideration, especially where the damage about to be inflicted is direct, or where a continuing trespass upon, or the title to, real property is threatened. Second, where the damage sought to be averted is intrinsically small, though not within the rule of *de minimis non curat lex*, the laches of the defendant, combining with the great damage to the defendant, will be decisive against the plaintiff's right to injunction. Third, when private interests only are concerned, if the defendant's wrong is wanton, he will not be heard to invoke the rule of comparative injury to the parties by the granting or refusing of the injunction. Fourth, where the benefits accruing from the wrong sought to be enjoined flow to the public, whose rights therein have attached, to discontinue which would damage or inconvenience great public interests, though the wrong may be wanton, the relative unimportance of the plaintiff's rights will be fatal to the granting of injunctive relief.

GLENDA BURKE SLAYMAKER.

Anderson, Ind.

Jenks, 19 Fed. Rep. 641, a motion for a preliminary injunction was overruled where the plaintiff sought to restrain the manufacture of a patent, the court remarking that the injury to the defendant by the granting of the injunctive would be great compared with the small benefit, if any, that might accrue to the plaintiff. Ryan v. Williams, 100 Fed. Rep. 172, was a suit by a minority stockholder for an injunction to restrain the majority of the stockholders from taking a certain intended action pertaining to the corporate affairs. Upon the preliminary hearing the court refused to grant the injunction, the court in the course of its opinion, saying: "Whether or not an injunction should be awarded is a matter addressed to the sound discretion of the court, and in its exercise all of the circumstances must be taken into consideration, not only the damage that may arise to the complainant by reason of its refusal, but the damage likely to result to the defendants upon its issuance. If there is a greater likelihood of damage from the latter than from the former, the injunction, as a rule, should be refused." In the case of Cumberland Telegraph and Telephone Company v. Union Electric R. Co., 42 Fed. Rep. 273, 12 L. R. A. 544, the court, in passing upon the right of the Telephone Company to restrain the Railway Company from operating its electric road in such a manner as to allow the escaping of the current into the ground, thereby interfering with the Telephone Company's business, and its service, considers at some length the balance of conveniences, but in conclusion, in enumerating the *ratio decedendi*, state the rule which is made the subject of this paper and refuse to grant the injunction upon the ground, among others, that the plaintiff's damage seemed to be only incidental to the operation of its road, and that for such damage the plaintiff was not entitled to the relief asked for. See 31 Cent. L. J. 423. See, also, *In re* Geddie's Estate, 9 Pa. Dist. Rep. 711, wherein is considered the question whether a decedent's business should be continued after his death by transferring it to a corporation to be formed to carry it on, or whether it should be sold and the proceeds divided among the distributees thereof, under a very novel state of facts.

RAILROADS — DISCRIMINATION.

HILTON LUMBER CO. v. ATLANTIC COAST LINE R. CO.

Supreme Court of North Carolina, November 15, 1904.

Under Laws 1899, p. 301, ch. 164, § 13, providing that any carrier charging one person more than another for the same service is guilty of discrimination, a railroad carrying raw material to factories cannot charge a factory which agrees to ship the manufactured product by the same road less for the same service than it charges a factory which will make no such agreement.

CLARK, C. J.: The gist of this action is for discrimination by the defendant in charging the plaintiff a higher rate on logs to the plaintiff's mill in Wilmington than was charged others for like service, and to recover the overcharges, which had been paid under protest. The point presented is not that the rate ($2.50 per thousand feet in car-load lots) charged the plaintiff is *per se* unreasonable, but that the rate charged others for the same service for the same distance was $2.10, and that this is a serious discrimination, which, if continued, will result in the crippling or destruction of the plaintiff's mill, and the building up of other mills which are in competition with the plaintiff, for it has in five months amounted to $3,900, for the recovery of which this action is brought.

The court charged the jury: "If you find that the rate of $2.10 per thousand feet was charged and collected by the defendant upon logs shipped over any part of its railroad to a mill or mills at which logs were manufactured into lumber, and the lumber itself reshipped over the railroad of the defendant, or any part of it, and that the reduced rate of $2.10 per thousand feet was given to such mill in consideration of such fact that they would ship the lumber manufactured out of the said logs over the line of the defendant's road, which said agreement was open to all mills that wished to accept it, then it would not be an unjust or illegal discrimination to charge $2.50 per thousand feet, which it is not contested is a reasonable rate to mills which did not ship their manufactured lumber over the line of the defendant road." The proposition herein stated is that a common carrier has a right to charge one person a lower rate of freight than another for shipping the same quantity the same distance, under the same conditions, provided the shipper give

the company a consideration (shipping the manufactured lumber subsequently over its line) which its managers think will make good to it the abatement of rate given to such parties. But if this is equality as to the treasury of the company, it is none the less a discrimination against the plaintiff. It is charged $2.50 while others are charged $2.10 for the same service. It is true, if the plaintiff should choose to agree to ship its manufactured lumber out of Wilmington over the defendant's line, it could get the same reduction of rate on its logs into Wilmington. On those conditions it could save itself from being discriminated against. But suppose the plaintiff should wish to sell its lumber in Wilmington, or can ship it at a lower rate by sea, or even by a competing railroad line out of Wilmington, has it not the right to do so? Should it see fit to exercise that right, has the common carrier the power to place a penalty of a 19 per cent. higher rate on the plaintiff, and to charge it $2.50 for bringing its logs to Wilmington, when it charges others $2.10 for exactly the same service?

The principle involved is a vital one to the public at large, for upon this alleged right to discriminate by common carriers, exercised either openly or secretly by rebates, nearly all trusts, and especially the Standard Oil Company, have been built up to their present disquieting and menacing predominance, as has been fully shown by the investigation and report of the Industrial Commission and the Interstate Commerce Commission, both appointed by acts of congress. Under the same idea that the test was the fact that the railroad company would not lose by the favor, extended in the present case by charging certain shippers $2.10 while charging the plaintiff $2.50, another railroad company charged the Standard Oil Company 10 cents per barrel while charging its competitors 35 cents per barrel, and paying 25 cents of the 35 cents thus collected to the Standard Oil Company. Handy v. Railroad (C. C.), 31 Fed. Rep. 689. The railroad company in that instance must have found its offset, its profit, some where, or it would not have made that arrangement. But what became of the competitors of the Standard Oil Company? Here the railroad company will doubtless make up, out of its forced monopoly of shipping out of Wilmington the lumber to be manufactured out of all the logs hauled in by it, the 40 cents which is deducted in favor of those who will give it that monopoly. But why should it discriminate by charging the plaintiff $2.50 instead of $2.10; *i. e.*, charge 19 per cent. higher rates upon logs which when turned into lumber are sold in Wilmington, or shipped by sea, or shipped by a competing route? It cost no more to bring in the plaintiff's logs than the logs for whose hauling only $2.10 was charged. The shipment of logs to Wilmington is one transaction. The shipment of lumber out is another. The defendant cannot charge the plaintiff higher on the logs because it will not agree to ship its lumber by the defendant's line. It is no answer to say that, if the plaintiff will come to the defendant's terms, it will get the same discount. The defendant might as well say, "If you will carry your logs to a sawmill in which the railroad company is a large owner, you will get 16 per cent. reduction in freight on your logs, and there is no discrimination, for the same offer is open to you as to others." If the plaintiff, like others, was shipping logs to Wilmington with the voluntary intention of shipping by the defendant's road, say to New York, then certainly there would be no discrimination. But the plaintiff does not wish to ship to New York over the defendant's line, and the defendant proposes "to put the screws to the plaintiff," and make it do so, whether it wishes to do so or not; and, if the plaintiff does not do so, the defendant says the plaintiff cannot be treated as well as others as to the rates for hauling its logs, but must pay nearly one-fifth (19 per cent.) higher rates on its logs. That is the very point at issue. Hauling its logs to Wilmington is the only service the plaintiff seeks at the defendant's hands. Why should it pay higher for that service than those who agree to carry their logs to the defendant's mill, or to ship out their lumber by the defendant's road.

Discrimination is a more dangerous power than high rates, if the latter is charged impartially to all. Hence the statutes of congress and of the state, while leaving the fixing of rates in the hands of commissions, have directly and strictly forbidden, under penalties, any discrimination. Common carriers are fixed with a public use. They exercise a branch of the public franchise. They can condemn rights of way solely because the land "is taken for a public use." They are subject to governmental supervision, and to the reduction or regulation of their charges by the legislature directly, or by commissioners appointed by its authority. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, and citation to same, 9 Rose's Notes, 21-55. In all the great countries of the world, except England and this country, the railroads are largely or altogether owned and operated directly by the government, as was formerly the case in North Carolina. In all countries alike it is recognized that it is of vital importance that corporations exercising such public use must be absolutely impartial and equal in their charges for the same service. All the service the plaintiff asks of the defendant is to haul its logs to its sawmill in Wilmington. For this it charges the plaintiff $2.50. It charges others $2.10; *i. e.*, 19 per cent. higher to the plaintiff than to others for exactly the same service. It costs the defendant no more to render that service to the plaintiff than to render the same service to others. It must charge all alike. Could the defendant discriminate on shipment of logs to Wilmington, for a consideration of a subsequent benefit to itself by obtaining a monopoly of shipment of lumber out of Wilmington, it could seriously damage the business and prosperity of that city. At that point are steamships and sailing lines and other

railroads, and this competition making the town a distributing center is the source of its prosperity. If the terms upon which the defendant will haul logs into Wilmington are that it must haul the lumber out, then Wilmington ceases, as to that business, to be a competing point. The same discrimination could be made, if this were allowable, in freight on cotton or corn or rosin and other articles carried to Wilmington to be manufactured or put into other forms for use. Discriminating rates, as in this case, could be charged on the raw product, which would permit of the manufactured article, cloths, yarn, meal, whisky, turpentine, and the like, being shipped out only over the defendant's line. This is to place the prosperity of Wilmington, and also of the producers of raw material contiguous to that city along the lines of any of the defendant's roads or branches, in the control of the defendant.

The point here presented has been often decided, and always—certainly at least in recent years—against the power claimed by the defendant. In Baxendale v. Railroad, 94 E. C. L. 308, after an elaborate argument, it was held by a very strong court as to this very point: "It is not a legitimate ground for giving a preference to one of the customers of a railroad company that he engages to employ other lines of the company for the carriage of traffic distinct from, and unconnected with, the goods in question; and it is undue and unreasonable to charge more or less for the same service, according as the customer of the railway thinks proper, or not, to bind himself to employ the company in other and totally distinct business." In Menacho v. Ward (C. C.), 27 Fed. Rep. 529, where the court was enlightened by the argument of Frederick Coudert and James C. Carter on opposing sides, it was held that "a common carrier cannot charge a higher rate against shippers who refuse to patronize it exclusively." President Hadley, in his Railroad Transportation, 108 — a valuable work, by no means unfavorable to railroads—says: "A difference in rates, not based upon any corresponding difference in cost, constitutes a case of discrimination." In Railroad v. Goodridge, 149 U. S. 680, 13 Sup. Ct. Rep. 970, 37 L. Ed. 986, it is said: "It is no proper business of a railroad company as a common carrier to foster particular enterprises or to build up new industries; but, deriving its franchises from the legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons on an absolute equality." This would not be the case if a patron shipping logs to Wilmington must pay higher for that service than one who subsequently ships lumber.

Among the numerous cases condemning discrimination, and holding that freight paid in excess of that charged others for the same service can be recovered back, are Hays v. Penn. Co. (C. C.), 12 Fed. Rep. 309, and cases cited in note thereto; Handy v. Railroad, *supra*—a spicy opinion by a justly indignant judge. It was held that charging from New Orleans to San Francisco a lower rate on goods shipped to New Orleans from London than upon the same goods shipped from New York to New Orleans was an unjust discrimination and illegal. Interstate Commerce Commission v. Railroad (C. C.), 52 Fed. Rep. 187. It is not the question of profit to the carrier, so the court holds, in attracting shipments which would not otherwise come to it, but the injustice of charging different rates for the same service; and the court quotes with approval the English decisions (Harris v. Railroad, 3 C. B. [N. S.] 693; Evershed v. Railroad, 2 Q. B. Div. 254) that "preferences given to shippers to induce them not to divert traffic from the carrier, or to induce them to transfer traffic which otherwise would go to another carrier, are unlawful, and cannot be justified upon the ground of profit to the carrier allowing them." To similar purport, Wight v. U. S., 167 U. S. 512, 17 Sup. Ct. Rep. 822, 42 L. Ed. 258; Packet Co. v. Railroad (C. Rep. C.), 60 Fed. Rep. 545; R. R. Co. v. Wilson, 132 Ind. 517, 32 N. E. Rep. 311, 18 L. R. A. 105, and many others. Even when the discrimination is based on a larger quantity being shipped, it is illegal, when the smaller quantity, as in car-load lots, costs no more to handle in proportion to the quantity. Kinsley v. Railroad (C. C.), 37 Fed. Rep. 181, approving Hays v. Penn. Co., *supra*.

The vice in the discrimination here shown is twofold: (1) It necessarily tends, if allowable, to build up defendant's railroad and break down competing carriers, which is forbidden by public policy. Joint Traffic Case, 171 U. S. 505, 19 Sup. Ct. Rep. 25, 43 L. Ed. 259. (2) The condition upon which the right to the lower rate was given was secret, not written on the face of the schedule, which, as reported to the Railroad Commission and printed for public information, was $2.50. A secret rebate is prohibited by statute and by all the decisions of the courts, yet this rebate of 40 cents not allowed to the plaintiff has amounted to $3,900, in five months' time.

The testimony of railroad officials in the report to congress of the Industrial Commission (Volume 4, p. 273, and Volume 9, p. 131) shows that the methods of discrimination resorted to are many, and that manufacturers especially can be made or destroyed at the will of railroad managers, unless there is the most absolute and exact equality to all in the same charge for the same service. Volume 9, pp. 287, 289, Report of Industrial Commission. Interstate Commerce Comm. v. Railroad, 128 U. S. 59, is one instance of an ingenious discrimination. The present case is another. Discrimination is protean in the divers forms it assumes. The argument in all countries in favor of governmental ownership of railroads is based on the deadly effect of discrimination in rates under private ownership, and the difficulty in preventing it, rather than

upon higher rates. The condition upon which private ownership of railroads can or will be maintained in England and this country (which alone retain it) is the strict and effective enforcement of equality in charge to all for the same service under the same conditions and at the same cost, as is required by the statutes both state and federal.

The defendant cannot justify under what is known as "milling in transit." Those are cases were freight is shipped a long distance, and the carrier will, at his own cost, defray the expense of its change in form en route, because of the easier handling in the more compact shape, as, for example, Cowan v. Bond (C. C.), 39 Fed. Rep. 54, where a railroad company receiving cotton in Louisiana for shipment to mills in New England had it compressed en route at Vicksburg at its own expense, charging the shipper no more than if it had carried the uncompressed cotton all the way; the same privilege being open to all shippers. That has no analogy to this case, where the plaintiff is shipping logs to its mill in Wilmington, and is charged nearly one-fifth more freight than others unless it will agree to ship its lumber out of Wilmington over the defendant's road. Among other cases in point are Mayor, etc., of Wichita v. Railway Co., 9 Interst. Com. R. 569, at pp. 572, 579, 580; The Tap Lines Cases, 10 Interst. Com. R. 193; Packet Co. v. Railroad, *supra*.

There are other errors assigned in the admission of evidence, in the charge, and in matters of practice; but in view of the error in this matter of vital interest to the public at large, and especially to the business interests of the state, it will be unnecessary to consider them. The plaintiff had a right to have its logs carried to its mill at the same rate as others, without binding itself to ship its lumber by the defendant's line, or, indeed, to ship it at all. But independent of any decisions, our statute, which nearly copies the English traffic act and the United States interstate commerce act in this and many other respects, is too explicit to be misconstrued. The corporation commission act (Laws 1899, p. 301, ch. 164) provides (Section 13) that if any common carrier shall charge or collect "from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands or collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

NOTE.—*Discrimination in Railroad Rates.*—It is a general rule well sustained by authority, that a railroad company must serve all alike and without discrimination. Thus a railroad cannot refuse to ship goods of one party because such party refuses to give him a monopoly of his business. Chicago, etc., R. R. v. Saffern, 129 Ill. 274, 21 N. E. Rep. 824.

"This doctrine," says Judge Emlin McClain in 6 Cyc. 498, "has been applied in many courts so as to prohibit discrimination in rates as between different shippers and entitle one who has been injured by such discrimination to recover damages against the carrier." Citing National Elevator Co. v. Railroad, 50 Ill. App. 339; Chicago, etc., R. R. v. People, 67 Ill. 11; Sloan v. Railroad, 61 Mo. 24, 21 Am. Rep. 397; Messenger v. Railroad, 36 N. J. L. 407; Scofield v. Railroad, 43 Ohio St. 571; Twells v. Railroad, 2 Walk. (Pa.) 450.

Federal legislation has also clearly defined unjust discrimination. Sec. 2 of the Interstate Commerce Act provides in substance that if any common carrier shall directly or indirectly, by special rate, drawback or other device, charge any person a greater or less compensation for any service rendered, in the transportation of passengers or property, than it charges any other person for doing him a like and contemporaneous service in the transportation of a like kind of traffic shall be deemed guilty of unjust discrimination.

There is a great conflict of authority whether the rule forbidding unjust discrimination is a common law rule and enforceable independent of any statute. In Cowden v. Steamship Company, 94 Cal. 470, 29 Pac. Rep. 873, 28 Am. St. Rep. 142, 18 L. R. A. 221, which is the leading case of one line of authorities it is held that at common law an action will lie against a common carrier for an unreasonable and excessive freight charge, but not for a mere discrimination in favor of another shipper. To same effect: *Ex parte* Benson, 18 S. Car. 38; Menacho v. Ward, 27 Fed. Rep. 529; Johnson v. Railroad, 16 Fla. 623, 26 Am. Rep. 731; Ragan v. Aiken, 9 Lea, 609, 42 Am. Rep. 684; Spofford v. Railroad, 128 Mass. 326; Interstate Commerce Commission v. Railroad, 145 U. S. 263; United States v. Railroad, 40 Fed. Rep. 101. But the great weight of authority is against the rule thus laid down, and it is held that a carrier at common law cannot discriminate between persons as to charges for the transportation of passenger or express traffic, but must permit equal facilities, to all persons on the same terms. McDuffee v. Railroad, 52 N. H. 430, 13 Am. Rep. 72; Sloan v. Railroad, 61 Mo. 24; Cook v. Railroad, 81 Iowa, 551, 46 N. W. Rep. 1080, 9 L. R. A. 764; Chicago, etc., R. R. v. People, 67 Ill. 11; Louisville, etc., R. R. v. Wilson, 132 Ind. 517, 32 N. E. Rep. 311, 18 L. R. A. 105; Root v. Railroad, 23 N. Y. S. Rep. 226; Hays v. Railroad, 12 Fed. Rep. 309; Atwater v. Railroad, 48 N. J. L. 55; Cleveland, etc., R. R. v. Closser, 126 Ind. 348, 9 L. R. A. 754; Fitzgerald v. Railroad, 63 Vt. 169, 13 L. R. A. 70.

What discriminations are unlawful? Discriminations by railroad companies in freight rates, based solely on the amount of freight shipped are unwarrantable. Kinsley v. Railroad, 37 Fed. Rep. 181; Providence Coal Co. v. Railroad, 1 Int. Com. Rep. 363; United States v. Tozer, 39 Fed. Rep. 369; Hays v. Pennsylvania Co., 12 Fed. Rep. 309; Burlington, etc., R. R. v. Fuel Co., 31 Fed. Rep. 652; Scofield v. Railroad, 43 Ohio St. 571; Louisville, etc., R. R. v. Wilson, 132 Ind. 517, 32 N. E. Rep. 311, 18 L. R. A. 105. But it is not unlawful for a carrier to put a lower rate on car-load lots than on less quantities. Brownell v. Railroad, 4 Int. Com. Rep. 285.

A railroad canpany may discriminate in favor of persons at a distance from its terminus, in order to get their freight which otherwise would go by a different route. Patrons of the road not so favored, have no action therefor if they are not charged more than reasonable rates. Ragan v. Aiken, 77 Tenn. (9 Lea), 609, 42 Am. Rep. 684. But the fact that goods are to be carried further by another route, after reaching the terminus of defendant's road, does not justify it in discriminating in its charges. Twells v. Railroad, 2 Walk. (Pa.) 450.

We believe the best rule for the determination of what is and what is not an unjust discrimination is contained in the decision of the court in the case of State v. Railroad, 47 Ohio St. 130, 23 N. E. Rep. 928, where it was held that a corporation engaged in carrying goods for hire as a common carrier has no right to discriminate in its freight rates in favor of one shipper, even when necessary to secure his custom, if the discriminating rate will tend to create a monopoly by excluding from their proper markets the products of the competitors of the favored shipper.

BOOK REVIEW.

WELLMAN'S ART OF CROSS-EXAMINATION.

"The proof of the pudding is in the eating," runs the old adage. So the proof of a good law book is the relish and alacrity with which it is purchased and read. Under the application of this test, Francis L. Wellman, the great advocate of the New York City Bar, has certainly given the profession a good book in his "Art of Cross-Examination." This book was first published in December, 1903. At that time the original manuscript was set up, electrotyped, and the first edition run off. This edition was quickly taken up to the amazement of the modest publisher who had been given to understand that lawyers were poor book buyers. Another edition was run off early in January which was all consumed before the month was up, necessitating the publication of another edition in January. This, too, was quickly distributed. In February the last edition was printed from the old plates. In a few months this too was gone and the publisher then did a most unusual thing—undertook to revise a book that had been in print only nine months. This book of Mr. Wellman's is popular because interesting. We cannot say it is particularly valuable to the old practitioner, but in its breezy style, exciting narratives and intense and minute description of brilliant climaxes taken from some of the greatest of recent trials, the lawyer finds much pleasure and mental recreation. To the younger lawyer it should prove valuable as well as interesting, in that it points out many secrets of the art of cross-examination which many an older practitioner has been compelled to learn at considerable cost in the school of experience. For the new edition the author has written five new chapters, besides revising the book and doubling the length of the chapter on "Experts." One of these new chapters details at length the cross-examination of Miss Martinez in the famous breach of promise case against the Cuban banker, which caused a profound sensation in New York several years ago. Another chapter is the cross-examination of Guiteau in the trial for the assassination of Garfield. Mr. Wellman has substituted the cross-examination of Russell Sage by Chauncey M. Depew in the second trial, for the cross-examination in the third trial, as being on the whole a better and more interesting example. He also has added a chapter on the "Fallacies of Testimony" and one on "Cross-Examination to Probabilities." Altogether, quite half the material in this edition is new.

Printed in one volume of 404 pages and published by The Macmillan Company, New York.

BOOKS RECEIVED.

A Treatise on the System of Evidence in Trials at Common Law, including the Statutes and Judicial Decisions of all Jurisdictions of the United State. By John Henry Wigmore, Professor of the Law of Evidence in the Law School of Northwestern University. Volume III. Boston, Little, Brown & Company, 1904. Sheep, pp. 1228. Price, $6.50.

HUMOR OF THE LAW.

Edgar Van Etten, vice-president of the Boston and Albany Railroad, says that some time ago he introduced a new system for getting information as to the destruction of farmers' property along the line of the railroad. A blank was prepared to give the name of the animal killed, the kind of animal and other information. A space was reserved for the answer to the following question: "Disposition of carcass?" A flagman whose duty it was to make a report on this blank wrote opposite the line named: "Kind and gentle."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Effect of Dismissal of Former Action —Pendency of a former action after dismissal thereof on defendants' motion held no objection to the further maintenance of the subsequent suit.—Grubbs v. W. B. Ferguson & Co., N. Car., 48 S. E. Rep. 551.

2. ABATEMENT AND REVIVAL—Suit to Redeem Land.—At common law the right to redeem from a deed absolute

in form, but intended as a mortgage, held to survive the grantor.—Clark v. Seagraves, Mass., 71 N. E. Rep. 813.

3. ACCIDENT INSURANCE—Limitations.—An insurance company held not to waive the defense of limitations, by coupling another reason with its refusal to pay.—Paul v. Fidelity & Casualty Ins. Co. of New York, Mass., 71 N. E. Rep. 801.

4. ADOPTION—Validity.—Where the laws of the state in which a child was adopted, and under which the adoption was alleged to be void, were not set out, the court, in determining the validity of such proceeding, would apply the *lex fori*.—James v. James, Wash., 77 Pac. Rep. 1082.

5. ADVERSE POSSESSION — Effect of Infancy.—Where, at the beginning of defendant's alleged adverse possession, plaintiffs, who held the legal title, were minors, it was error for the court in ejectment to charge that such minority did not affect the question of adverse possession, and to give other charges ignoring such disability.—Bradford v. Wilson, Ala., 37 So. Rep. 295.

6. ALTERATION OF INSTRUMENTS — Changing Date of Payment.—An alteration in a note, so as to make it payable after the maker's death, instead of one year after date, is a material alteration.—Bowers v. Rineard, Pa., 58 Atl. Rep. 912.

7. ALTERATION OF INSTRUMENTS—Rate of Interest on Mortgage.—Where note secured by mortgage is canceled by alteration, the mortgage debt draws interest at 7 per cent.—Edwards v. Sartor, S. Car., 48 S. E. Rep. 537.

8. APPEAL AND ERROR—Certiorari to Review Acts of County Commissioner —The judgment annulling the order of a board of county commissioners on *certiorari*, directed to it and its clerk, held, under Rev. Code Civ. Proc. § 440, not reviewable on appeal by the clerk alone.—State v. Boyden, S. Dak., 100 N. W. Rep. 761.

9. APPEAL AND ERROR—Failure to Object to Refusal to Charge.—Where defendant did not except to the charge, or request the court to set out the same or any part thereof in the case, it would be conclusively presumed on appeal that the charge was free from error.—Graves v. Norfolk & S. R. Co., N. Car., 48 S. E. Rep. 502.

10. APPEAL AND ERROR — Findings of Fact.—A decree depending on a question of fact, as to which the evidence was conflicting and supported the finding, held not to be disturbed on appeal.—Williams v. Moulton, Mass., 71 N. E. Rep. 808.

11. APPEAL AND ERROR — Findings of Trial Court.—Where the proof in a controversy involving the title to real property leaves the matter in doubt as to who is the actual owner, the finding of the trial court will not be interfered with on appeal.—Black v. Cox, Ky., 82 S. W. Rep. 278.

12. APPEAL AND ERROR—Instruction as to Non-unanimous Verdict, Harmless.—An instruction on an unconstitutional statute, that five members of a jury of six might return a verdict, was not prejudicial, where the verdict returned was unanimous.—Fitzhugh v. Brown, Colo., 77 Pac. Rep. 1091.

13. APPEAL AND ERROR—Partnership Accounting Tried Before Referee.—Where a case was tried before a referee, and the evidence was not reported, except as contained in the "minutes" of the referee, objections that various items were allowed without evidence will not be reviewed on appeal.—Holt v. Howard, Vt., 58 Atl. Rep. 797.

14. APPEAL AND ERROR — Refusal of Continuance.—A refusal of a continuance will not be reversed, unless an abuse of discretion is shown. — Richardson v. Ruddy, Idaho, 77 Pac. Rep. 972.

15. ASSAULT AND BATTERY — Opprobrious Words in Mitigation of Damages.—Opprobrious words held to be considered in mitigation of punitive damages, but not of actual damages, in an action for assault and battery.—Mitchell v. Gambill, Ala., 48 S. E. Rep. 290.

16. ASSAULT AND BATTERY — Threats.—A mere threat of violence menaced, accompanied by insulting words, held insufficient to constitute an assault.—State v. Daniel, N. Car., 48 S. E. Rep. 544.

17. ASSOCIATIONS—Liability of Members.—Members of an unincorporated political party organization held not personally liable to a member for services performed on a party newspaper, and hence an action therefor cannot be maintained against the treasurer thereof, under Code Civ. Proc. § 1919.—Lightbourne v. Walsh, 89 N. Y. Supp. 856.

18. ATTORNEY AND CLIENT—Right to Employ Associate Counsel.—Retainer of counsel held not implied authority to him to employ associate counsel at the client's expense.—Lathrop v. Hallett, Colo., 77 Pac. Rep. 1095.

19. AUCTION AND AUCTIONEERS—Payment by Check.—In an action on checks given to plaintiff as an auctioneer for the price of mortgaged personalty sold at public auction, a finding that plaintiff as auctioneer went into possession of the property on behalf of and as agent of the mortgagor held contrary to the evidence.—Williams v. Corker, Cal., 77 Pac. Rep. 1004.

20. BANKRUPTCY — Attorney of Bankrupt Acting for Trustee.—An order of court against the attorney of the bankrupt acting for the trustee "in bankruptcy proceeding" held not to apply to his acting for the trustee in a suit by him.—Callahan v. Israel, Mass., 71 N. E. Rep. 812.

21. BANKRUPTCY—Collateral Attack of Decree.—Giving to a deed of an assignee in bankruptcy, confirmed by the bankruptcy court, effect other than according to its terms held in effect to annul in a collateral proceeding the decree of the bankruptcy court.—Trumbo v. Fulk, Va., 48 S. E. Rep. 525.

22. BANKRUPTCY — Fraudulent Conveyance.—Where a trustee in bankruptcy assigned his interest as trustee to premises fraudulently conveyed by a bankrupt, and any right of action as to such property, only a naked right of action to attack the fraudulent conveyance was obtained, which right is not enforceable.—Annis v. Butterfield, Me., 58 Atl. Rep. 898.

23. BANKS AND BANKING — Action Against Directors.—A qualified intervening stockholder, in suit against directors of a bank for negligence, held authorized to maintain the action, though plaintiff was disqualified.—Hanna v. Lyon, N. Y., 71 N. E. Rep. 778.

24. BILLS AND NOTES—Certificate of Deposit. — Where a certificate of deposit is payable to the depositor's order, the certificate of deposit must be presented to the bank properly indorsed.—Young v. American Bank, 89 N. Y. Supp. 915.

25. BRIDGES—Evidence, Personal Injury.—Settlement by defendant with the owner of an engine for taking it out of the stream into which it went, from the breaking of defendant's bridge, when plaintiff was driving it over the bridge, held not admissible in evidence as to action for plaintiff's personal injuries from the accident.—Comstock v. Georgetown Tp., Mich., 100 N. W. Rep. 788.

26. BRIDGES — Malicious Burning of Bridge.—Burning of a bridge on a highway, being intentional and without honest belief that it was not on a highway, held malicious.—People v. Myring, Cal., 77 Pac. Rep. 975.

27. BRIDGES—Reasonable.—Under the facts an accident from the breaking of defendant's bridge, without plaintiff's negligence, held a mere casualty, for which defendant was not liable. — Comstock v. Georgetown Tp., Mich., 100 N. W. Rep. 788.

28. BROKERS—Commissions.—In an action for division of brokers' commissions, a request to charge that, unless the person claiming the commission finds a purchaser and communicates the fact to the other party at the time, he cannot recover, held properly refused.—McCleary v. Willis, Wash., 77 Pac. Rep. 1073.

29. CARRIERS—Discounting Draft on Strength of Bill of Lading.—Where a bank discounted a draft with a bill of lading attached, the goods could not be subjected, as against the bank, by a creditor of the shipper to the payment of a debt against him.—Temple Nat. Bank v. Louisville Cotton Oil Co., Ky., 82 S. W. Rep. 253.

30. CARRIERS—Loss of Freight.—The setting out of a flat car on a siding at its destination by a carrier held not to constitute a delivery of tools shipped thereon to the consignee.—Normile v. Northern Pac. Ry. Co., Wash., 77 Pac. Rep. 1087.

31. CARRIERS — Prospective Passengers Approaching Car.—One merely approaching a street car to board it held not entitled to the rights of a passenger as to the care to be exercised by the carrier.—Duchemin v. Boston Elevated Ry. Co., Mass., 71 N. E. Rep. 780.

32. CARRIERS—Refusal to Charge Contributory Negligence.—In an action for injuries alleged to have resulted from defendant's negligence, defendant's requests to charge on the issue of contributory negligence, which exclude the idea that defendant was negligent at all, were properly refused.—Graves v. Norfolk & S. R. Co., N. Car., 48 S. E. Rep. 502.

33. CHATTEL MORTGAGES—Estoppel to Dispute.—That a mortgagor has accepted advances under a chattel mortgage does not estop him from disputing its validity.—Rose v. Harllee, S. Car., 48 S. E. Rep. 541.

34. CHATTEL MORTGAGES—Permission to Sell.—In an action against a chattel mortgagor for the alleged fraudulent sale of the property to plaintiff, an instruction that the mortgagee's verbal permission to defendant to sell was no defense held error.—Colston v. Bean, Vt., 58 Atl. Rep. 795.

35. CHATTEL MORTGAGES — Rights of Purchaser at Auction Sale.—Purchasers of mortgaged personalty at auction sale held to have no right to deduct any indebtedness due her from the mortgagor from the amount she agreed to pay to the auctioneer.—Williams v. Corker, Cal., 77 Pac. Rep. 1004

36. CLUBS—Illegal Expulsion From.—Constitution of membership corporation organized for social and literary purposes, providing that members should belong to a certain political organization, held invalid.—Stein v. Marks, 89 N. Y. Supp. 921.

37. CONSPIRACY—Unfair Competition.—It is unlawful for those forming a conspiracy for the purpose of injuring another's business as oil merchant to harass and annoy his employees, while engaged in the discharge of their duties in selling and distributing oils to his customers.—Standard Oil Co. v. Doyle, Ky., 82 S. W. Rep. 271.

38. CONSPIRACY — Unlawful Purpose and Means.—Statement of objects, purposes, and means to be used which will make a conspiracy criminal, Gen. St. 1902, § 1296.—State v. Stockford, Conn., 58 Atl. Rep. 769.

39. CONSTITUTIONAL LAW—Description of Property in Chattel Mortgage.—Civ. Code 1902, § 3002, requiring description of property in chattel mortgage to be filed in writing or typewriting, held not a violation of the fourteenth amendment of the federal constitution, or Const. 1895, art. 1, § 5.—Rose v. Harllee, S. Car., 48 S. E. Rep. 541.

40. CONSTITUTIONAL LAW—Officer's Bond.—The constitutionality of a law requiring the bond of an officer to be a lien on the real estate of the officer and his sureties cannot be attaked by persons voluntarily executing such bond.—City of Mt. Vernon v. Kenlon, 89 N. Y. Supp. 817.

41. CONSTITUTIONAL LAW—Registered Bottles.—The provisions of Rev. Laws, ch. 72, § 16, making it a misdemeanor to without authority use, deface, or traffic in registered bottles of a manufacturer of beverages, held constitutional.—Commonwealth v. Anselvich, Mass., 71 N. E. Rep. 790.

42. CONTRACTS Construction.—Where there is no dispute as to the facts, the court can enter judgment based on interpretation of contract.—Continental Title & Trust Co. v. Devlin, Pa., 58 Atl. Rep. 848.

43. CORPORATIONS — Authority to Execute Notes.—Where the president of a corporation had authority to execute a note for the corporation, it was no defense as against an innocent holder that the proceeds were used to pay the president's individual debt.—Schreyer v. J. S. Bailey & Co., 89 N. Y. Supp. 870.

44. CORPORATIONS—Co-operative Associations.—A by-law of an incorporated co-operative association, entitling a member on application to withdraw his stock at its par value, held valid.—Lindsay v. Arlington Co-op. Assn., Mass., 71 N. E. Rep. 797.

45. CORPORATIONS—Expulsion of Member from Club.—Where members of a membership corporation are illegally expelled, the remedy at law by an action against the individual members of the association is insufficient, justifying relief in equity.—Stein v. Marks, 89 N. Y. Supp. 921.

46. CORPORATIONS — Instructions. — In an action against a corporation, an instruction that the case should be considered the same as a case between two private citizens is correct.—Chicago & E. I. R. Co. v. Burridge, Ill., 71 N. E. Rep. 838.

47. CORPORATIONS—Ostensible Authority of Secretary.—A corporation held bound by the transaction of its secretary, within its ostensible authority of general manager and its charter powers.—Petts v. Southern California Fruit Exch., Cal., 77 Pac. Rep. 993.

48. CORPORATIONS—Reissuance of Stock.—A pledgee of certain stock held entitled to the same as against a subsequent purchaser from the pledgor under fraudulent representations that the certificates were lost, who had obtained an order for the reissuance of such certificates under Code 1887, § 1135, whether sections 1133, 1135, were applicable to court charters, under which the corporation was operating, or not.—Downing v. Thompson, Va., 48 S. E. Rep. 506.

49. COSTS—Stay of Proceedings.—Where one action is legal and the other equitable, the rule to stay proceedings in the latter until the costs in the former are paid will not be applied.—Johnson v. Amberson, Ala., 37 So. Rep. 273.

50. COUNTIES—Disallowance of Claim.—Under the direct provision of Code 1896, § 13, a suit must not be brought against a county until the claim has been presented to the court of county commissioners and disallowed.—Scarbrough v. Watson, Ala., 37 So. Rep. 281.

51. COURTS—Right of Single Justice to Dismiss Appeal.—A single justice of the supreme court held to have jurisdiction to hear and determine a motion to dismiss a creditor's appeal from a probate decree allowing a guardian's final account.—Leyland v. Leyland, Mass., 71 N. E. Rep. 794.

52. CRIMINAL EVIDENCE — Confession. — Defendant's voluntary statement before a justice of the peace, on being informed of the charge against him, before he was warned, that he was "guilty," held properly admitted against him.—State v. Blay, Vt., 58 Atl. Rep. 794.

53. CRIMINAL LAW—Clerical Misprision —Affidavit on which prosecution was based, signed "K. Clerk," held sufficient, under Acts 1900-01, p. 864, §15.—Pruett v. State, Ala., 37 So. Rep. 343.

54. CRIMINAL LAW— Illness of Juror.—Where a jury was discharged over defendant's protest, by reason of the illness of a juror, before any testimony had been introduced, defendant was not thereby put in jeopardy.—People v. Hutchings, Mich., 100 N. W. Rep. 753.

55. CRIMINAL LAW—Separating Jurors Before Being Sworn.—Where the veniremen have not been sworn as jurors the rule in capital cases forbidding them to separate has no application.—Bell v. State, Ala., 37 So. Rep. 281.

56. CRIMINAL TRIAL—Amendment of Record after Verdict.—On appeal from the municipal court, if the record is not a true record, the court may permit its amendment before deciding a motion in arrest.—State v. Smith, Me., 58 Atl. Rep. 779.

57. CRIMINAL TRIAL—Inference from Failure to Produce Evidence.—Instructions to superior court as to inference to be drawn from failure to produce evidence in the examining court as to a defense held proper.—Commonwealth v. Anselvich, Mass., 71 N. E. Rep. 790.

58. DAMAGES—Father's Right of Action for Injury to Son.—A father held not entitled to recover exemplary damages for a negligent injury to his minor son, in the absence of a statute permitting it.—Bube v. Birmingham Ry., Light & Power Co., Ala., 37 So. Rep. 285.

59. DAMAGES—Liquidated Damages for Non-performance of Contract.-A deposit of money and stock under an option contract for the sale of an iron manufacturing plant held liquidated damages for non-performance by the purchaser, and not merely to secure the corporation against loss.—Garcin v. Pennsylvania Furnace Co., Mass., 71 N. E. Rep. 793.

60. DAMAGES—Personal Injuries.—Under a declaration alleging injury to an arm, held that the effect of such injury on the use of the hand may be shown.—Comstock v. Georgetown Tp., Mich., 100 N. W. Rep. 788.

61. DEDICATION—Evidence.—A petition for a highway and a grant therefor, both signed by defendant, held relevant and admissible on the issue of dedication, on a prosecution for malicious burning of a bridge on a highway.—People v. Myring, Cal., 77 Pac. Rep. 975.

62. DEPOSITIONS—Death of Witness.—Where intestate was injured in a railroad accident, from which he subsequently died, his declarations as to the circumstances attending the injury should have been preserved by a deposition *de bene esse*.—Meekins v. Norfolk & S. R. Co., N. Car., 48 S. E. Rep. 501.

63. DEPOSITIONS—Defect in Notice.—Defect in notice to take deposition held waived by the adverse party appearing and cross-examining.—Babcock v. Ormsby, S. Dak., 100 N. W. Rep. 759.

64. DIVORCE—Condonation of Adultery.—Intercourse by husband and wife after he has knowledge and means of proving her adultery held condonation.—Rogers v. Rogers, N. J., 58 Atl. Rep. 822.

65. DOWER—Timber Growing on Dower Land.—Dowress held not entitled to cut and sell timber growing on dower land.—Hawpe v. Bumgardner, Va., 48 S. E. Rep. 554.

66. EJECTMENT—Right to Maintain Action.—Where land grants conferred constructive seizin, it was sufficient to enable the patentee or his successors to maintain ejectment, without proof of seizin in fact.—Howdashell v. Krenning, Va., 48 S. E. Rep. 491.

67. ELECTIONS—Contest.—A failure to deny an averment in an election statement that contestant was an elector at the time and period mentioned therein is an admission of that fact.—Doty v. Jenkins, Cal., 77 Pac. Rep. 1107.

68. EMINENT DOMAIN—Interest on Award.—Interest on award for property condemned, when title is vested in city before confirmation of commissioners' report, cannot be charged to owner.—*In re* City of New York, 89 N. Y. Supp. 769.

69. EMINENT DOMAIN—Judicial Act, Must be Entered of Record.—Judicial act of city officers in taking private property for public use must be entered of record.—Kidson v. City of Bangor, Me., 58 Atl. Rep. 900.

70. ESTOPPEL—Available at Law and in Equity.—The defense of equitable estoppel is as available at law as in equity.—Hoge v. Fidelity Loan & Trust Co., Va., 48 S. E. Rep. 494.

71. EVIDENCE—Conspiracy.—The acts and declarations of a conspirator, after the completion of the purpose for which the conspiracy was formed, are competent evidence only against that particular conspirator.—Standard Oil Co. v. Doyle, Ky., 82 S. W. Rep. 271.

72. EVIDENCE—Delayed Telegram.—Addressee of delayed telegram may testify as to whether he would have answered if he had received it.—Willis v. Western Union Tel. Co., S. Car., 48 S. E. Rep. 538.

73. EVIDENCE—Flinching as Evidence of Personal Injury.—Flinching of plaintiff when the injured parts were touched held not to have occurred under such circumstances that it could be given in evidence in an action for the injury.—Comstock v. Georgetown Tp., Mich., 100 N. W. Rep. 788.

74. EVIDENCE—Hypothetical Question, as to Mental Capacity.—In a will contest, where the mental capacity of testator was involved, hypothetical question to medical experts on the subject of mental capacity held proper.—*In re* Peterson's Will, N. Car., 48 S. E. Rep. 561.

75. EVIDENCE—Market Price of Fruit.—Testimony as to market price of fruit held not incompetent because witness derived his knowledge from the information of others.—Betts v. Southern California Fruit Exch., Cal., 77 Pac. Rep. 993.

76. EXCEPTIONS, BILL OF-Agreement for Extending Time of Signing.—A bill of exceptions signed during the term succeeding the trial, though pursuant to an agreement, held not to be considered; Prac. Rule 30 (Code 1896, p. 1200) being violated by such agreement.—Abercrombie & Williams v. Vandiver, Ala., 37 So. Rep. 296.

77. EXECUTORS AND ADMINISTRATORS—Frivolous Appeal from Order of Partial Distribution.—Where an executor's appeal from an order directing a partial distribution of the estate was frivolous, he was personally chargeable with $100 damages for the delay occasioned thereby.—*In re* Straus' Estate, Cal., 77 Pac. Rep. 1122.

78. EXECUTORS AND ADMINISTRATORS — Survival of Right to Redeem Land.—At common law, on death of the grantor in a deed absolute in form, but intended as a mortgage, held, the right to redeem survives to the heirs, not the administrator.—Clark v. Seagraves, Mass., 71 N. E. Rep. 813.

79. EXEMPTIONS—Fraudulent Conveyances.—Even if a fraudulent grantee has the right of the fraudulent grantor, under Comp. Laws, § 10,326, to claim exemption, held, that he waives it, unless he give notice to the officer attaching the property as that of the grantor.—Williams v. Brown, Mich., 100 N. W. Rep. 786.

80. EXPLOSIVES—Sulphuric Acid in Freight Station.—In an action against a railroad company as owner and occupant of the premises for freight depot purposes, to recover for personal injuries resulting from the explosion of an iron tank of sulphuric acid, proof held insufficient to show that such acid so consigned is inherently a dangerous substance.—Means v. Southern California Ry. Co., Cal., 77 Pac. Rep. 1001.

81. FACTORS — Ostensible Authority.—Defendant, to whom plaintiff delivered fruit to complete a sale already made by it, it to receive a commission, held liable for the value thereof, having without plaintiff's authority or knowledge used same for another purpose.—Betts v. Southern California Fruit Exch., Cal., 77 Pac. Rep. 993.

82. FALSE IMPRISONMENT—Justice of the Peace.—A justice of the peace, having issued a warrant for plaintiff's arrest on a complaint which was insufficient to confer jurisdiction of the subject-matter, held personally liable for false imprisonment.—Goodell v. Tower, Vt., 58 Atl. Rep. 790.

83. FIRE INSURANCE—Breach of Condition as to Other Insurance.—Policy of insurance construed, and held, that insurer was not liable, where other insurance was taken out without his consent.—Nestler v. Germania Fire Ins. Co., 89 N. Y. Supp. 782.

84. FIRE INSURANCE—Loss Payable to Mortgagee — Where an insurance policy is payable to the mortgagee as his interest may appear, the mortgagee, in order to recover, must show that his security or interest was damaged.—Uhlfelder v. Palatine Ins. Co., 89 N. Y. Supp. 792.

85. FIRE INSURANCE—"Steam Farm Engines"—The term "steam farm engine" in a fire policy held to cover any engine adapted to farm purposes.—Wilson v. Union Mut. Fire Ins. Co., Vt., 58 Atl. Rep. 799.

86. FIXTURES—As Between Mortgagor and Mortgagee.—Gas fixtures held not fixtures as between mortgagee and mortgagor.—Condit v. Goodwin, 89 N. Y. Supp. 827.

87. FIXTURES—Right as Between Purchaser of Real Estate and Personalty.—Gas logs, gas chandeliers, and window screens in summer residences held fixtures, as

between the mortgagee of the premises and one given a bill of sale of "the personal property" therein.--Cunningham v. Seaboard Realty Co., N. J., 58 Atl. Rep. 819.

88. FORCIBLE ENTRY AND DETAINER—Nature of Possession.—Prosecutrix's possession of defendant's house held not such as to authorize prosecution of him for forcible entry; she having never been his tenant, and only been in possession by sufferance, and he having demanded possession.—State v. Leary, N. Car., 48 S. E Rep. 570.

89. FRAUD—Principal and Agent.—Proof that representations inducing a payment of money by plaintiff's agent on his behalf were made to such agent held to support a declaration alleging that the declarations were made to plaintiff and that he paid the money.—Sudworth v. Morton, Mich., 100 N. W. Rep. 769.

90. FRAUDS, STATUTE OF—Division of Partnership Assets.—A transaction held not a sale within the statute of frauds (Rev. Laws, ch. 74, § 5), but merely a division of assets of a partnership.—Mason v. Spiller, Mass., 71 N. E. Rep. 779.

91. FRAUDS, STATUTE OF—Question not Raised at Trial.—Where, on hearing before a referee, defendant did not object to any evidence on the ground that it was inadmissible under the statute of frauds, such objection was waived.—Holt v. Howard, Vt , 58 Atl. Rep. 797.

92. FRAUDULENT CONVEYANCES—Assignment of Naked Right to Set Aside.—Assignment of the mere naked right to set aside a fraudulent conveyance by bankrupt's trustee held invalid.—Annis v. Butterfield, Me., 58 Atl. Rep. 898.

93. FRAUDULENT CONVEYANCES — Preferences. — The giving of a preference by a debtor to a creditor while insolvent is not a fraud on other creditors, though the preferred creditor had knowledge that its effect would be to defeat the collection of other debts.—Johnson v. Lucas, Va., 48 S. E. Rep. 497.

94. GIFTS—Bank Deposit. — Facts held to show an executed gift of a joint interest in the bank deposit entitling the donee to the deposit on the death of the donor.—Industrial Trust Co. v. Scanlon, R. I., 58 Atl. Rep, 786.

95. GIFTS — Expression of Intention. — Plaintiff held not entitled to claim as a gift what deceased merely expressed an intention of giving her, and in directions for a will, before executing which he died, provided should be given her.—Weatherbee v. Litchfield, Mass., 71 N. E. Rep. 796.

96. GUARANTY — Notice of Acceptance. — A guaranty waiving notice of acceptance, not set out in a petition thereon, but referred to as a part of the pleading, held insufficient to dispense with the allegation of notice of acceptance.—Goff v. Janeway & Carpender, Ky., 82 S. W. Rep. 267.

97. GUARDIAN AND WARD—Employment of Attorneys. —An action will not lie against a minor or his estate for the value of legal services rendered to the guardian in assisting him in the execution of his trust.—McKee v. Hunt, Cal., 77 Pac. Rep. 1103.

98. GUARDIAN AND WARD—Necessity for Guardian Ad Litem.—In an action by a statutory guardian to sell his ward's land for reinvestment, a guardian *ad litem* should be appointed.—Siler v. Archer's Guardian, Ky., 82 S. W. Rep. 256.

99. HABEAS CORPUS — Application for Bail.—In order that it may not prejudice the rights of defendant in a criminal case, the supreme court will not, in refusing an application for bail, discuss either the facts or the law of the case.—State v. Hartzell, N. Dak., 100 N. W. Rep. 745.

100. HABEAS CORPUS—Review of Appellate Court.—On a writ of *habeas corpus* on a commitment in the nature of a final judgment, the only question is whether the magistrate had jurisdiction of the offense, of the person and to pronounce the judgment rendered.—People v. Warden of City Prison, 89 N. Y. Supp. 830.

101. HIGHWAYS—Collision of Team with Pedestrian.—A finding that plaintiff, when struck by a team, was "crossing the junction" of two streets, as alleged in the complaint, held authorized, though he was on the edge of the sidewalk, and for two or three seconds had stopped to look across.—Drew v. Farnsworth, Mass., 71 N. E. Rep. 783.

102. HOMESTEAD—Sale by Lienors.—Lienors held entitled to sell homestead property for debts, so that the rights, if any, of the heirs of the deceased lienee to a homestead are in the fund arising from the sale, and determinable only when proceeds of sale are ready for distribution.—Hawpe v. Bumgardner, Va., 48 S. E. Rep. 554.

103. HOMICIDE — Absence of Premeditation. — Where one, in the heat of passion and without premeditated intention to take life, kills another, he is not guilty of murder in the first degree.—Bowles v. Commonwealth, Va., 48 S. E. Rep. 527.

104. HOMICIDE — Evidence.—On trial for assault with intent to kill, the fact of the finding of empty gun shells and gun wadding on the scene of the shooting the next day after the affray held not admissible.—Nickles v. State, Fla., 37 So. Rep. 312.

105. HOMICIDE — Instructions as to Degree of Crime. —Charge that defendant could not be convicted of any degree of homicide greater than manslaughter held properly refused.—Bell v. State, Ala., 37 So. Rep. 281.

106. HUSBAND AND WIFE—Alienating Affections. — In an action for unlawfully persuading plaintiff's wife to abandon marital intercourse, defendant can be found guilty if his unlawful persuasions were a contributing cause, though they may not have been the sole cause.—Plourd v. Jarvis, Me., 58 Atl. Rep. 774.

107. HUSBAND AND WIFE—Curtesy in Mortgaged Property.—Where land belonging to a wife was mortgaged and sold under foreclosure after her death, the proceeds descended to her heirs as realty, charged with the mortgage to the husband's curtesy interest.—Harrington v. Rawls, N. Car., 48 S. E. Rep. 571.

108. HUSBAND AND WIFE — Mortgage.—Under Ky. St. 1903, § 2127, where a married woman signed a mortgage to secure her husband's debt, her plea of coverture and that she signed as surety only held a valid defense to the extent of her personal liability for the debt.—Hall v. Hall, Ky., 82 S. W. Rep. 269.

109. INFANT — Cost of Appeal. — Where certain infant appellees were not represented by a guardian or next friend, the costs of the appeal would be taxed to the appellants, though the cause was reversed. — *Ex parte* Cooper, N. Car., 48 S. E. Rep. 581.

110. INJUNCTION — Sufficiency of Complaint. — Complaint in suit to restrain tenant from using opening cut in the basement hall without consent of plaintiff, his landlord, held not to state a cause of action.—Glascoe v. Willard, 89 N. Y. Supp. 791.

111. INNKEEPERS — Failure to Obtain License. — In a prosecution for operating a hotel without a license, evidence that defendant, while ill, intrusted the management of the hotel to his clerk, and directed him to procure a license, which he failed to do, held no defense.—Commonwealth v. Keathley, Ky., 82 S. W. Rep. 232.

112. INTEREST — Partnership Accounting. — In an action to recover a balance due on mutual account, simple interest was allowed on annual balances.—Holt v. Howard, Vt., 58 Atl. Rep. 797.

113. INTERPLEADER — Laches. — City, holding fund claimed by creditors of contractor, held not guilty of laches, barring suit of interpleader by it.—City of New York v. Cody, 89 N. Y. Supp. 886.

114. JUDGMENT—Quieting Title.—Judgment held inadmissible to show title had been transferred to defendant, in a suit to quiet title and set aside such judgment quieting title in defendant.—Parsons v. Weis, Cal., 77 Pac. Rep. 1007.

115. JUDGMENT — Void, How Determined.—Whether a judgment is void on its face is to be determined by an inspection of the judgment roll.—Parsons v. Weis, Cal., 77 Pac. Rep. 1007.

116. JUSTICES OF THE PEACE—Suing on Separate Items of Account.—One having a claim against another, consisting of items arising under different contracts, held entitled to sue on a single contract, and in a justice's court, the amount due under that contract permitting it, though the entire claim is too great to allow action there.—Copland v. American De Forest Wireless Telegraph Co., N. Car., 48 S. E. Rep. 501.

117. LANDLORD AND TENANT — Common Counts. — A lessee held not entitled to maintain action on the common counts against his lessor, where during the term injunction issued at suit of another against his use of the property.—Prochaska v. Fox, Mich., 100 N. W. Rep. 746.

118. LANDLORD AND TENANT — Entry with Force.—The mere delivery of the key by the tenant to the landlord does not entitle the landlord to enter and expel by force the tenant who continues in actual possession.—Giffin v. Martel, Vt., 58 Atl. Rep. 788.

119. LANDLORD AND TENANT — Oral Agreement to Repair.—A mere oral agreement, without consideration, made by a landlord, during the term of the lease, to make repairs, held not binding.—Altsheler v. Conrad, Ky., 82 S. W. Rep. 257.

120. LANDLORD AND TENANT — Writ of Assistance. — Writ of assistance, in an equitable action by committee of incompetent person to set aside conveyance of farm made by incompetent, denied.—Baird v. Van Vechten, 89 N. Y. Supp. 879.

121. LARCENY — Withholding Papers.—A withholding of a commission to take testimony by plaintiff from defendant, to enable plaintiff to submit the same to his attorney, held insufficient to constitute larceny.—Parr v. Loder, 89 N. Y. Supp. 823.

122. LEWDNESS—Proof of Residing Together.—To convict of lascivious cohabitation, under Rev. St. 1892, § 2596, proof alone of a residing together of the parties is insufficient.—Whitehead v. State, Fla , 37 So. Rep. 302.

123. LIBEL AND SLANDER—Matters Not Pleaded.—Matter not pleaded by plaintiff may be allowed as a partial defense in mitigation of damages.—Burnham v. Franklin, 89 N. Y. Supp. 917.

124. LIFE INSURANCE — Assignment by Wife to Secure Husband's Debts —A married woman may assign her interest in a life insurance policy on her husband's life to secure her husband's debt.—Herr v. Reinoehl, Pa., 58 Atl. Rep. 862.

125. LIFE INSURANCE—Default Judgment Founded on False Allegations.—Defendant, in a default judgment, held not entitled to have the same set aside for fraud, consisting of false allegations and proof, which were known to it at the time the judgment was rendered.—Mutual Reserve Fund Life Assn. v. Scott, N. Car., 48 S. E. Rep. 581.

126. LIMITATION OF ACTIONS — Injury Due to Landlord's Breach of Agreement to Repair.—The cause of action stated by a petition held not one for personal injuries, to which the one-year statute of limitations applies, but one for breach of contract, to which the five-year statute applies.—Altsheler v. Conrad, Ky , 82 S. W. Rep. 257.

127. MANDAMUS — Canvassing Board of Elections. — Mandamus will not lie against the mayor and council to compel them to reconvene as a canvassing board and recanvass an election for city recorder; their terms having expired.—Holdermann v. Schane, W. Va., 48 S. E. Rep. 512.

128. MANDAMUS—County School Superintendent.—On mandamus to a county superintendent where a decision of the state board of education is relied on as a defense, held, that jurisdiction to render, and the correctness of such decision may be decided.—People v. Vanhorn, Colo., 77 Pac. Rep. 978.

129. MANDAMUS—Damages for Land Taken for Highway.—Mandamus will not lie by a taxpayer, on behalf of himself and others, to compel town auditors to audit awards for damages for land taken for highway.—People v. Morgan, 89 N. Y. Supp. 832.

130. MANDAMUS—Discretion of Court.—Where the performance of an official duty sought to be compelled by mandamus might result in benefit to relator, and defendants could not be injured thereby, it was not an abuse of the trial court's discretion to grant the writ.—State v. Boyden, S. Dak., 100 N. W. Rep. 763.

131. MANDAMUS—Salary of Policeman During Wrongful Discharge.—A policeman is not entitled to maintain mandamus to compel the payment of his salary while he stood discharged from the force and until reinstatement.—City of Chicago v. People, Ill., 71 N. E. Rep. 816.

132. MANDAMUS—Writ Must be on Transcript Paper.—A return to a writ of mandamus in the supreme court, not written on transcript paper, as required by the rules of such court, will not be considered.—*Ex parte* Geter, Ala., 37 So. Rep. 341.

133. MARRIAGE—Attorney's Fees in Annulment Proceedings.—Counsel fees and expenses allowed a wife in suit to annul marriage.—Gore v. Gore, 89 N. Y. Supp. 902.

134. MASTER AND SERVANT-Contributory Negligence.—Where there was no other possible theory as to plaintiff's injury, except defendant's negligence, the rule that the accident was not of itself evidence of negligence did not apply.—McLean v. Pere Marquette Ry. Co., Mich., 100 N. W. Rep. 748.

135. MASTER AND SERVANT—Failure to Inform Servant of Dangerous Machinery.—In an action for injuries to an inexperienced servant, defendant held guilty of negligence in failing to have informed plaintiff of the dangers incident to the operation of the machinery.—James v. F. A. Ames & Co , Ky., 82 S. W. Rep. 229.

135 MASTER AND SERVANT-Fellow Servants—Plaintiff when injured, held a passenger of defendant, so that the negligence of defendant's engineer was not that of a fellow servant of plaintiff.—Holmes v. Birmingham Southern R. Co., Ala., 37 So. Rep. 338.

137. MASTER AND SERVANT—Presumption of Negligence.—The mere occurrence of an accident to an employee does not raise even a *prima facie* presumption that the master has been guilty of negligence.—Moore Lime Co. v. Johnston's Adm'r., Va., 48 S. E. Rep. 557.

138. MINES AND MINERALS—Location of Mining Claims. —Subsequent discovery of oil, after the posting of notice and marking of a placer oil mining claim on public land, held available to perfect such location, in the absence of intervening claims of third persons.—Weed v Snook, Cal., 77 Pac. Rep. 1023.

139. MUNICIPAL CORPORATIONS—Assessment for Street Improvements. — Act Feb. 18, 1895, § (4 Acts 1894 95, p. 907) authorizing imposition of the entire cost of street paving on the abutting property according to frontage, held constitutional.— City Council of Montgomery v. Moore, Ala., 37 So. Rep. 291.

140. MUNICIPAL CORPORATIONS—Defective Sidewalks. —In an action against a city for injuries resulting from a fall on a defective sidewalk, covered with ice and snow, plaintiff's own negligence held to bar his right to recover. — City of Charlottesville v. Failes, Va., 48 S. E. Rep. 511.

141. MUNICIPAL CORPORATIONS — Defective Streets.— In an action against a city for injury to a pedestrian by a defect in a street, an instruction assuming that the street in which the defect exisited had been accepted by the city held error.—Clay City v. Abner, Ky., 82 S. W. Rep. 276.

142. MUNICIPAL CORPORATIONS—Injury Due to Felling Tree.—In an action for injuries to a traveler by a city's negligence in felling a tree, plaintiff held not bound to show that the horse which she was driving at the time was ordinarily gentle — City of Colorado Springs v. May, Colo., 77 Pac. Rep. 1093.

143. MUNICIPAL CORPORATIONS-Officers Act Judicially When Laying Out Sewers.—Municipal officers in laying

out sewers act judicially, and are in no sense the agents of the city.—Kidson v. City of Bangor, Me., 58 Atl. Rep. 900.

144. MUNICIPAL CORPORATIONS — Public Improvements.—San Francisco Charter, art. 12, § 4, held to require a favorable two-thirds votes of all votes cast at a special election to authorize the issuance of bonds for public improvemects —Law v. City and County of San Francisco, Cal., 77 Pac. Rep. 1014.

145. MUNICIPAL CORPORATIONS — Raising Grade of Crossing Railroad.—A city under its charter held not to have power to in effect vacate part of a street by allowing a railroad to cross it on an embankment.—Dean v. Ann Arbor R. R., Mich., 109 N. W. Rep. 773.

146. MUNICIPAL CORPORATIONS—Special Assessments. —A special assessment will not be enjoined because the improvement is not made in conformity with the ordinance; the remedy being by mandamus.— Lyman v. City of Chicago, Ill., 71 N. E. Rep. 832.

147. MUNICIPAL CORPORATIONS—Wrongful Discharge of Policaman.—A discharge from the police force, without giving the policeman an opportunity to be heard in his own defense, is unwarranted.—City of Chicago v. People, Ill., 71 N. E. Rep. 816.

148. NEGLIGENCE—Burden of Proof.—In an action to recover damages for alleged negligence, the burden is on the plaintiff to show negligence by a preponderance of the evidence.—Chesapeake & O. Ry. Co. v. Heath, Va., 48 S. E. Rep. 508.

149. NEGLIGENCE-Child on Roof a Licensee.—Plaintiff, a child, injured on defendant's roof, held not there by defendant's invitation; but merely as a licensee, so that she took the roof as she found it.—McCoy v. Walsh, Mass., 71 N. E. Rep. 792.

150. NEGLIGENCE — Collision of Steamer and Row-boat.—The contributory negligence of one rowing and in charge of a boat with the consent of his companion, in getting in front of a steamer held attributable to the companion.—Yarnold v. Bowers, Mass., 71 N. E. Rep. 799.

151. NEGLIGENCE — Contemporaneous Negligence. — The doctrine of prior and subsequent negligence is not applicable, where the negligence of the plaintiff and that of defendant are practically simultaneous.—Butler v. Rockland, T. & C. St. Ry., Me., 58 Atl. Rep. 775.

152. NEGLIGENCE —Injury to Licenseee.—Owner of building partly destroyed by fire held not liable to license on the premises, injured by fall of a wall.—Haack v. Brooklyn Labor Lyceum Ass'n, 89 N. Y. Supp. 888.

153. PARTITION — Cotenancy. — Where partition deeds were executed, conveying property to a husband and wife which she previously owned in common with others, the deeds carried no title, but operated merely as a severance of the unity of possession.—Harrington v. Rawls, N. Car., 48 S. E. Rep. 571.

154. PARTITION—Creditors of Decedent.—In action by heirs for partition, rights of unsecured creditors whose claims have been allowed by the surrogate determined, though no sale was had, under Code Civ. Proc. § 2750, or action brought against heirs, under section 1042.—Hughes v. Golden, 89 N. Y. Supp. 765.

155. PARTNERSHIP—Accounting.—Plaintiff held entitled to recover in an action of assumpsit in his own name the balance found due on a settlement between himself and defendant, which included a partnership indebtedness of defendant, which plaintiff had acquired.—Holt v. Howard, Vt., 58 Atl. Rep. 797.

156. PAUPERS—Expenses for Support. — Where a pauper in an almshouse renders services which diminish the general expenditure to an amount equal to the cost of his support, held, that no expense is incurred for his support, so as to authorize a recovery thereof, under Rev. Laws, ch. 81, § 9.—City of Taunton v. Talbot, Mass., 71 N. E. Rep. 785.

157. POST OFFICE—Substitution of Contractor for Carrying Mail.—In an action for breach of a contract of defendant as a subcontractor for the transportation of mail over a mail route, a complaint failing to allege that such contract had been authorized by the original contractor and the United States government held fatally defective.—McConaghy v. Clark, Wash., 77 Pac. Rep. 1084.

158 PUBLIC LANDS—Relocating Survey Lines.—Statement of rule for relocating lines of subdivisions of a government survey. — Yolo County v. Nolan, Cal., 77 Pac. Rep. 1006.

159. QUIETING TITLE—Proof of Possession.—Proceedings to have the cloud of a fraudulant conveyance removed cannot be maintained without proof of possession.—Annis v. Butterfield, Me., 58 Atl. Rep. 898.

160. RAILROADS—Injury to Licensee.—A mere licensee on the premises of a railroad company used for freight depot purposes held to have no right of action against the railroad for injuries received by the explosion of a tank of sulphuric acid.—Means v. Southern California Ry. Co., Cal , 77 Pac. Rep. 1001.

161. RAILROADS—Right of Way Affected by Delay in Building.— A delay of two and a half years in building five miles of railroad, the construction of which cost $7,000,000, held not so unreasonable as to constitute a breach of a right of way contract, requiring the construction to be completed within areasonable time.—Bell v. Southern Pac. R. Co., Cal., 77 Pac. Rep. 1124.

162. RAPE—Intent.—In a prosecution for assault with intent to have sexual intercourse with a female under 16 years of age, defendant's intent held a question for the jury.—State v. Clark, Vt., 58 Atl. Rep. 796.

163. REFERENCE — Partnership Accounting. — Where, on an accounting, a referee found certain items claimed by defendant were payments for things not charged in plaintiff's specification, such items were properly disallowed.—Holt v. Howard, Vt., 58 Atl. Rep. 797.

164. RELIGIOUS SOCIETIES—Jurisdiction of Courts.—Civil courts will interfere in ecclesiastical matters only where there are conflicting claims as to church property or civil rights.—Westminster Presbyterian Church v. Findley, 89 N. Y. Supp. 801.

165. SUNDAY—Baseball for Paid Admissions.—Public game of baseball on Sunday, to which admission fee is charged, held a misdemeanor, under Pen. Code, § 265.—People v. Poole, 89 N. Y. Supp. 773.

166. TRUSTS—Deposit in Savings Bank.—Deposit in savings bank held to create a valid trust, rendering the trustee liable on subsequent misappropriation of the funds.—Lattan v. Totten, 89 N.Y. Supp. 761.

167. WATERS AND WATER COURSES—Suit to Restrain Diversion.—In a suit to restrain the diversion of water from a stream, a prohibitive injunction should not be granted, unless adequate relief could not be otherwise afforded.—Montecito Valley Water Co. v. City of Santa Barbara, Cal., 77 Pac. Rep. 1113.

168. WILLS—Destruction or Revocation. — Mutilation, by cutting out a clause of a will and pasting together the edges of the remaining parts, held not to show destruction or revocation of will.—*In re* Westbrook's Will, 89 N. Y. Supp. 862.

169. WILLS—Fee Simple.—Will devising land to S, and if she died without issue alive, then over, held to pass a fee to S on her surviving the testator.—Smith v. Hull, 89 N. Y. Supp. 854.

170. WILLS—Provisions Against Contest. — Provision of will for ferfeiture if legatee contests its validity will not be enforced, where the contest was justified.—*In re* Friend's Estate, Pa., 58 Atl. Rep. 853.

171. WILLS—Rights of Executrix.—Executrix of a will, to whom property was devised, held to hold the same as trustee, though she was not named in the will as the trustee, and had not been so appointed by the probate court.—Bean v. Commonwealth, Mass., 71 N. E. Rep. 784

172. WITNESSES—Hesitancy in Answering Questions.—Witness' hesitancy in answering a question as to capacity of testator held not evidence of falsity of the answer.—*In re* Donohue's Will, 89 N. Y. Supp. 871.